THE ENFORCEMENT OF ACCESS

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I. INTRODUCTION: SCOPE AND METHODOLOGY

Canadian legislation allows for a parent to obtain custody and access orders upon either separation or divorce. When a couple separates, such orders are obtained under provincial legislation, such as *The Family Maintenance Act* of Manitoba. When a couple divorces, orders are obtained under federal legislation, specifically the *Divorce Act*. In either case, the access rights following divorce or separation tend to be an afterthought to the judicial and adversarial process. Most of the emphasis in legal thought and sociological research has been placed on custody.

> Access is a thing which can only be dealt with after the question of custody is determined; it means access to children who are in the custody of some other person. Custody is a much larger and more important thing that access. **Evershed v. Evershed** (1882), 46 L.T. 690 at 691 (Ch.) per Kay, J.

However, in recent years, more and more attention has been focused on the right of the child to have access to both parents and the means by which that can be achieved in a family where hostility between the spouses continues. A general consensus has developed in the legislatures, the courts and amongst academics, lawyers and others involved in the family law field, that maintenance of a close relationship between children and the non-

custodial parent, usually the father, is critical to the children's psychological health and well-being. Much social science research supports this view, in particular the oft-cited studies done by Dr. Judith S. Wallerstein and her colleagues in the United States (Surviving the Breakup: How Children and Parents Cope With Divorce (1982) with J. Kelly, and Second Chances: Men, Women and Children a Decade After Divorce (1989) with S. Blakeslee). Even Goldstein, Freud and Solnit, the iconoclastic psychoanalysts who argued in the seventies that access should be totally at the discretion of the custodial parent and not legally enforceable, advocated that access should be encouraged (Beyond the Best Interest of the Child, 1973 and 1979 editions).

Access rights are generally awarded to the non-custodial parent unless it can be shown to be detrimental to the child.

> Access is to be decided in light of what is in the best interests of the child. Generally, it is in a child's best interest that the non-custodial parent have access and access is only to be terminated where it can be shown that it is dangerous in a physical or emotional sense to the child. **Rutherford v. Rutherford** (1986), 4 R.F.L. (3d) (B.C.S.C.) per Spence J.

In the past decade or so, legislation intended to encourage access has been enacted in many jurisdictions in both Canada and the United States. For example, Parliament included the so-

called "friendly parent rule" in the new divorce act. Section 16(10) of the *Divorce Act* provides:

> In making an order under this Section the Court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best intersts of the child and, for that purpose, shall take into consideration the willingness of that person for whom custody is sought to facilitate such contact.

In Manitoba, the *Family Maintenance Act* was amended in 1983 to provide that a court, in determining the issue of access, must be guided by the principal that access is "for the purpose of visiting the child and fostering a healthy relationship between parent and child."

Concomitantly, there has been increasing pressure from some sources to improve the enforcement of access rights when denied or frustrated by a custodial parent. The extent of the problem of access denial is a matter of debate. Some argue that failure to exercise access by the non-custodial parent is a greater problem. For example, the data obtained in the federal Department of Justice study released last year ("Evaluation of the *Divorce Act*, May 1990, Phase II: Monitoring and Evaluation) does not appear to show that access denial is a widespread problem. At pages 134 and 135, the report states:

> ...lack of contact between non-custodial parents and the children is rarely, contrary to what father's rights groups

> have claimed, due to denial of access. Rather the larger problem is that some, notably fathers, do not exercise their access rights or do so infrequently and unpredictably. As we have stressed, we believe our sample of divorced and divorcing to be economically, socially and psychologically, at the less distressed end of the divorcing population. Yet, even here, we find that some children are deprived of maximum contact with one of these parents, not because of actions by the custodial parent but the inaction of the non-custodial parent. Clearly, legislative reform or different procedures are not likely to have much impact in encouraging the exercise of access rights. (references omitted).

Nevertheless, there is little disagreement that access disputes can be one of the most trying and intractable problems in family law.

Access denial problems can occur in a number of contexts in an addition to an outright refusal to allow access: where the custodial parent openly or subtly influences the children to turn against their other parent; where the access parent is uncooperative or inflexible about arranging access; or where the custodial parent moves to a distant location making it impossible or difficult for the other parent to exercise access. Similarly, the custodial parent may experience difficulties when the other parent either does not exercise access at all, or does so on an irregular and infrequent basis.

In response to the perceived need for greater intervention in this area, on March 1, 1989, the Manitoba government introduced a

three year pilot access assistance program designed to assist those separated and divorced families who have continuing access disputes. The program is operated jointly by Family Conciliation Services and the Department of Justice and is restricted to Winnipeg for the three year evaluation term.

It is a unique program in that it combines elements of mediation and social support services with legal remedies. The program is child-focused and has as its main objective assisting the child to re-establish a positive and continuing relationship with the non-custodial parent through appropriate access. Non-custodial parents may request assistance from the program to re-establish access. As well, custodial parents may request assistance where a non-custodial parent is not upholding their commitment for time with the child.

The program does not utilize mediation techniques only. It is restricted to couples who have attempted traditional mediation and have still failed to reach agreement. Arbitration rather than mediation is attempted. Where this type of intervention proves unsuccessful, referral may be made to the Department of Justice which, in appropriate cases, will provide counsel in court proceedings.

This report is an attempt to place the Manitoba program in context. It will not evaluate the Manitoba program. That is the subject of a separate report. Instead, this report examines the present state of the law in Canada respecting access enforcement by reviewing Canadian jurisprudence over the past decade or so, and analyzing Canadian legislation, both provincial and federal. In addition, a survey of the literature was undertaken with a view to describing current critical thought and new approaches and identifying any research or studies in the area of access enforcement in Canada and elsewhere. While we did not examine in any detail case law and legislation outside Canada, a computer search of American legislation was performed to supplement information from the literature search on the American approach to this problem.

In reviewing this report it must be recognized that access enforcement overlaps with other areas of family law, and accordingly the issue is often dealt with in conjunction with concerns of a somewhat different nature. For example, relocation of the custodial parent and the child may give rise to parental mobility rights issues as well as access enforcement issues. In the parental mobility rights cases, the custodial parent's move may effectively deprive the non-custodial parent of access. Generally, where the purpose of the move, or one of the purposes,

was to frustrate the access, we have regarded it as an access enforcement case, but where such misconduct is not a factor, we have regarded it as a parental mobility rights case. These other related issues - such as parental mobility rights and jurisdictional conflicts - are of course important from an overall policy perspective, but are not within the scope of this study. To the extent possible, this survey on the cases, legislation and literature narrows in on the issue of access enforcement only.

Similarly, the annotated bibliography focuses on the literature dealing with access enforcement only, and material dealing with access generally or mediation generally has been excluded with some exceptions, i.e. original studies or works frequently referenced.

Finally, this study does not examine the normative or policy issue of to what extent the state, either through the courts, the legislature, or services, should become involved in the enforcement of access. Such an inquiry is clearly beyond the scope of this study.

II. JURISPRUDENCE

Appendix A contains annotations of Canadian cases on access enforcement, grouped mainly by remedy sought or employed, and listed chronologically within each category. In the following discussion, references to cases will usually be by case name and year only. The reader is asked to refer to the appendix itself for legal citations and more detail about each case.

1. Specified Access

Many and probably most access agreements and orders provide for the non-custodial parent to have "réasonable access" or "liberal access" or simply "access" unqualified. In "Court-based Divorce Mediation in Four Canadian Cities" (1988), at pages 36 and 37, Richardson reports that in a majority of decisions studied the "courts assume - sometimes incorrectly that people can work out access arrangements themselves, and they either leave the matter of access open and vague or use terms such as "reasonable" or "liberal" access. Where the parties are unable to cooperate, such vagueness leads to difficulties.

The usual first response of lawyers when confronted with disagreements over access when attempting to settle the terms of an

agreement between separated spouses should be to attempt to define the access as to date and time in order to reduce room for dispute.

The courts appear reluctant to involve themselves in such detail when making an original access order. Witness the Nova Scotia judge's comments in **Adams** (1987) that specified access was appropriate despite the court's "great dislike and distaste for having to determine specific details as to access." In any event, when access problems bring the parties back to court, the courts often resort to specifying access as the simplest remedy and one with little in the way of negative side-effects except rigidity.

2. Supervised Access

Supervised access is an alternative sometimes used by the courts, particularly where the custodial parent alleges the reason for the denial of access is harm or danger to the child and the court is not satisfied this allegation is without foundation, or when the child, for other reasons including lack of contact with the non-custodial parent, is apprehensive about the visits.

3. Suspension or Cancellation of Support Payments or Arrears

Canadian courts have generally refused to link access and child support. As a rule, a parent is not entitled to refuse access because support has not been paid, and, conversely, a parent is not entitled to refuse maintenance because of denial of access by the custodial parent. The principle justification advanced for the non-linkage rule is that the penalty in either case will usually detrimentally affect the children, either by material or emotional deprivation. As the court stated in Twaddle (1985), at page 345,

> In theory, child maintenance should not be linked to any other form of relief but must stand alone and independent of all other rights and obligations vis-a-vis the parties. To permit even the slightest erosion of such principle is to create, potentially, a situation where the children of the marriage will suffer.

However, the courts have taken a different view in some cases where there is a separation agreement containing detailed access provisions and the court can regard a denial of access as a breach of the agreement. In Shoot (1956), for example, the court refused to enforce support arrears because of the custodial parent's move with the child to a distant location in violation of an agreement with specified access. The court regarded the support and access provisions as interdependent and not severable.

With respect to enforcing arrears, the courts are sometimes willing to deviate from the non-linkage principle even with court orders. For example in **Turecki** (1989), the court declined to enforce child support arrears where the custodial mother had the child from the father for five years and did not pursue support for fear of discovery.

The court in **Twaddle** did suggest that withholding of spousal support, as opposed to child support, might be an appropriate remedy to deal with the custodial parent's misconduct. In **Martin** (1976) spousal support was reduced where the custodial mother moved with the child out of the jurisdiction in breach of a non-removal order, but there do not appear to be any move recent cases of this nature. The explanation for this may simply relate to the fact that spousal support is not often granted, as documented by the federal Department of Justice Evaluation of the *Divorce Act*.

However, there have been some cases where the courts have broken with the non-linkage rule even with current child support. At least with the recent cases, the courts have only been willing to condition maintenance on access in the most intransigent situations. In **Brownell** (1987) for example, where the father had

done everything legally possible to see the children and the mother had engaged in a "protracted and deliberate campaign" to obstruct access, the court suspended child support until such time as meaningful access was established. In Manitoba, the custodial mother's "vindictive" and "manipulative" behaviour in Harrison (1987) drove the court to order that a denial of access would relieve the father of liability for the support payment next due after the event.

In Harrison, the judge noted that she was satisfied the children would suffer no deprivation from the failure to pay maintenance. Such comments suggest that the law should only permit the conditioning of maintenance on access, if at all, when the custodial parent's financial situation is such that the lack of child support will not harm the child.

The difficulty with this approach, as some commentators have pointed out, is that this remedy is likely to have most impact where the financial help is needed the most and thus where the absence of child support is most likely to be detrimental to the child. Eaton Taylor in her 1984 article ("Making Parents Behave: The Conditioning of Child Support and Visitation Rights") points out, that at page 1076,

> ...the coercive impact of termination will vary considerably depending on the economic situation of the custodial parent.

> Its coerciveness is limited when parents are on either end of the economic scale and more effective when parents are closer to the middle range. However, the unique financial position of each individual family and the unique economic behaviour of each custodial parent will ultimately determine the extent to which termination can effectively coerce parental behaviour.

In addition, cessation of support may engender or increase hostility between the children and the non-custodial parent.

Professor J. McLeod writing in 1989 ("Enforcement of Access and Ontario Bill 124," at 337), is of the opinion that, despite these drawbacks, Canadian courts are increasingly willling to consider imposition of this remedy. In 1984, Eaton Taylor commented that American courts are increasingly linking support and access ("Making Parents Behave: The Conditioning of Child Support and Visitation Rights", at 1059.) Some American states even have legislation authorizing the conditioning of maintenance and access, although most do not permit linkage, and Czapanskey writing in 1989, ("Child Support and Visitation: Rethinking the Connections") states that, contrary to Eaton Taylor's assertions the current trend is towards disconneccting the two. Our survey of Canadian cases does not reveal a judicial movement one way or the other with respect to the court's willingness to link the two issues.

The cases do, however, appear to support the point made by McDonald and Komar ("Access Rights to Children and Maintenance Obligations: A Quid Pro Quo?" 1979, at 315) that Canadian courts are generally opposed to self-help by the non-custodial parent, i.e., where the non-custodial parent simply stops paying support without sanction by the courts.

4. Contempt

Contempt proceedings have traditionally been used in Canada to deal with non-compliance with access orders when other methods such as specified access have been tried and failed. However, the requirements to establish contempt are onerous and the wisdom and utility of the traditional remedial orders - fines and incarceraton - questionable.

In Gribben (1973), the court stated that "the process of contempt should be used sparingly and with a view to protecting the administration of justice." The courts have generally held that the denial of access must be wilful and persistent before finding the custodial parent in contempt.

The reported cases indicate that fines or jail are rarely ordered. The judicial reticence stems again from concerns that

these measures impact negatively on the children - by depriving them of their caregiver for a period of time or hurting the family's finances. Furthermore, if the custodial parent is judgment proof there is no incentive to change. In his annotation to Rutherford (1986), Prof. McLeod comments, at page 458,:

> The normal means of punishment (of contempt) are censure, fine or imprisonment. None of these directly provide access. Fines simply reduce the family income of the lower income family or become a licence to break the law for those who can afford it. Courts are extremely wary of putting a custodial parent in jail, having regard to the best interest of the child. In any event, jailing will only increase the animosity between the spouses and is likely to further erode the access parent's relationship with the child when the child finds out, which is likely to happen.

However, courts are not confined to ordering fines or jail upon a finding of a contempt, and some courts are finding more creative ways of trying to remedy the offending conduct. For example, in Yunyk v. Judd (1987), the Manitoba court ordered specified make-up visits.

5. Change in Custody

The courts often threaten to change custody if the custodial parent persists in their misconduct, but until recently, the reported cases indicate Canadian courts rarely, if ever, actually do it to remedy access denial. In two recent Alberta cases, **Tremblay** (1987) and **Rose** (1989) the court gave the non-custodial parent custody: in one case, the custodial mother had repeatedly defied numerous access orders, and, in the other, the custodial father had deliberately eroded contact between the mother and the children, to the point where he even sold a house he had purchased before he moved in when he discovered the mother had bought a house close by to be nearer the children. In **Tremblay**, the court stated, at page 170,:

> The court should not automatically change custody if the custodial parent refuses access or otherwise interferes with the development of a normal parent and child relationship between the non-custodial parent and the child of the marriage. However, where the parent refuses access, serious questions are raised about the fitness of that person as a parent. The refusal to grant access after it is ordered is a change in circumstances sufficient to satisfy s. 17(5) of the (Divorce Act, 1985).
> In deciding questions of custody one needs to take into account the best interests of the child. It is in the children's best interests to live with the parent who is prepared to be co-operative with respect to access in cases where both parents can equally well look after the children or, even if there is a divergence in parenting skills, as long as the co-operative parent is fit to look after the children.

6. Criminal Code

There are two sections of the Criminal Code which conceivably could be used in access denial situations. (The reader is directed to Appendix B, Canadian Access Enforcement legislation, where the sections are found under the heading "Canada".)

The first is section 282, abduction in contravention of a custody order. This is a serious offence. Where conviction is on indictment, it carries a maximum penalty of ten years imprisonment. Charges are normally only laid under this section when a non-custodial parent breaches a custody order, as opposed to an access order and it is generally thought this is the problem the section was designed to address. For example, in R. v. Powless (1988), the Ontario provincial court quashed an information against a custodial mother who had withheld specified access on the grounds that the section does not apply to access orders.

However, in a recent case, the British Columbia Court of Appeal has taken a very expansive view of the scope of section 282, which would appear to provide a precedent for using section 282 as a method of enforcing access orders. In R. v. Petropoulous (1990), the father moved the child out of the jurisdiciton in contravention of both specified access and non-removal

orders. He was convicted under s. 282 and the appeal court upheld the conviction. The court interpreted the term "custody provision of a custody order" broadly holding that the non-removal clause came within the meaning of the term. Depriving a person with access rights, at least rights involving an actual transfer of possession of the child, is enough to bring the matter within the scope of the section.

As Professor McLeod comments in his annotation to the case:

> "Ordinary access" usually involves the access parent spending alternate weekends with the child. Is this arrangement within s. 282? The case opens the door to enforcement of access rights any time a custodial parent tries to defeat the access parent's rights. The difficulty will be in deciding what access rights are sufficiently substantial to come within the meaning of s. 282. Taylor, J.A. also draws a distinction betweeen purpose and "intention" which makes the charge easier to prove. In the end, there is likely to be a flurry of cases relying of **R. v. Petropoulous** to protect access rights.

The other section of the Criminal Code which might be used is section 127, criminal contempt proceedings for disobedience of a court order. Like section 282, this section is rarely, if ever, used for access violations. In two older cases, **R. v. Rupert**, (1975) and **R. v. Andrews**, (1978), the courts held that criminal contempt proceedings are not available for access violations, in light of other remedies.

However, in a Manitoba case, R. v. Clement, (1981), the Supreme Court of Canada ruled that a person can be prosecuted for criminal contempt for violating a court order in a family matter. That case involved a breach of a restraining order, but the same reasoning could apply to breaches of access orders. Certainly the British Columbia Court of Appeal in R. v. Petropoulous thought so, as the court stated the custodial parent was clearly liable to prosecution under section 127.

Use of the criminal code for access violations may be more expeditious and may provide a much stronger deterrent than the civil remedies, but it has also all the negative consequences of civil contempt and more.

It is worth noting that several American jurisdictions specifically provide that access interference can be a criminal offence. For example, visitation interference is an offence under the Arizona Criminal Code, the West Virginia Code, the California Penal Code and the Virginia Code.

7. Other Remedies

A. Compensatory Access

In Yunyk v. Judd (1986), the Manitoba Court of Queen's Bench (Family Division) ordered make-up visitation as a remedy for non-compliance with an specified access order.

B. Counselling

In both Casement (1986) and Harrison (1988), the court ordered counselling for the children, basically in order to try to repair the damage done by the custodial parent to the access parent's relationship with the children.

C. Payment of Costs and Expenses

In Curtis (1990), the Ontario court ordered the custodial mother to bear the financial burden of additional access costs occasioned by her decision to move with the children to Hawaii from Ontario. Amongst other things, she was ordered to pay for round trip airfare, as well as ground transportation, accommodation and food, for the father to visit with the children in Hawaii, and half the costs of the children's travel to visit the father.

In Staranowicz (1990), the Ontario court ordered the custodial mother, who had clandistinley moved to British Columbia, to return to Ontario with the children at her expense for pre-trial examinations and an independent assessment, and for a sufficiently long period of time for access to occur. The court also assessed costs against her on the highest scale.

D. Security for Contribution to Access Parent's Costs

In Curtis (1990), discussed above, the court also ordered that the mother's interest in a Toronto residence be charged with the amount of $5,000 to cover any amount she owed to the father as a result of the court orders providing that she cover the additional costs of access.

E. Damages for Interference with Access

Over the last 15 years, several American courts have recognized access denial as an offshoot of the tort of intentional infliction of emotional stress and awarded damages to the non-custodial parent. In addition, in one American case, the court allowed an action for access intereference as an independent tort.

In Canada, the Supreme Court has foreclosed this route without legislative intervention. In Frame v. Smith (1987), the Supreme Court refused to recognize access interference as a cause of action at common law in tort or as a breach of fiduciary duty. In a strong dissent, Madame Justice Bertha Wilson argued that a cause of action for breach of fiduciary duty should be available for denial of access.

While such a remedy is certainly not a quick and easy panacea to access denial problems - indeed it would appear to have little value as a means of making access actually take place, it may be useful as a general deterrent, and it is certainly appealing in terms of equity in situations of gross injustice such as Mr. Frame appears to have experienced at the hands of his former spouse. Jeffrey Leon suggests (in "The Wisdom of Solomon: A Comment in Frame v. Smith", 1989) that the provinces should enact legislation providing for the breach of fiduciary duty action described by Madame Justice Wilson.

In Alaska, state legislation specifically provides for damages of $200 for each episode of access denial. However, the Alaska approach is open to the same criticism as suspension of maintenance and fines: the harm to the child of the economic sanction.

8. Children's Refusal to Visit

This section of Appendix A canvasses some of the cases in which the courts have dealt with the issue of the child's refusal to visit.

9. Remedies where Access Parent Not Exercising Access

The conventional wisdom appears to be that there is very little, if anything, that can be done to force a reluctant parent to visit, and if it were possible, access by such a parent could well be detrimental to the child. However, there is a growing recognition that if visitation cannot bé forced, at least the custodial parent should be economically compensated for having to shoulder the entire responsibility of child care. In Russo (1988), the Ontario court purported to increase child support partly to cover the mother's additional child care costs resulting from the custodial father's failure to exercise access at all.

III. LEGISLATION

Appendix B contains Canadian legislative provisions directly or indirectly relevant to access enforcement categorized by jurisdiction. Our review of the legislation indicated that at the present time neither Quebec nor the North West Territories have any legislation which could be considered relevant to the issue of access enforcement and therefore these two jurisdictions do not appear in the appendix nor in the summary table of provincial legislation beginning on the next page of this report. The summary table should be read in conjunction with the appendix in order to understand the abbreviated terms used in the table. For example, "facilitation of access" refers to "friendly parent" type provisions such as section 16(10) of the *Divorce Act* which provides that, in deciding custody, the court must consider the willingness of each parent to facilitate access.

On perusing the table, it should be immediately evident that some Canadian jurisdictions, notably Newfoundland and Saskatchewan, have taken a much more aggressive approach to the issue of access enforcement than others. Manitoba's legislation falls in the middle ground.

COMPARISON OF PROVINCIAL ACCESS ENFORCEMENT LEGISLATION

	MANITOBA	ALBERTA	BRITISH COLUMBIA	NEW BRUNSWICK	NEWFOUNDLAND	NOVA SCOTIA	ONTARIO	PRINCE EDWARD ISLAND	SASKATCHEWAN	YUKON
Facilitation of Access	FMA 39(2)(d)				CLA 26(5)				CLA 6(5)(a)	CA 30(g)
Right to School & Other Information	FMA 39(4), 39(5)				CLA 26(6)		CLRA 20(5)	CJEA 3(5)	CLA 9(2), 9(3)	CA (31(5)
Order to Locate & Take a Child	FMA 11 CCEA 9			FSA 132.1	CLA 43		CLRA 37	CJEA 21	CLA 24	CA 46
Order to Prevent Removal of Child From Province	CCEA 10			FSA 132.2	CLA 44		CLRA 38	CJEA 22	CLA 25	CA 47
Penalties for Breach	FMA 50(1), 50(2) CCEA 14(1), 14(2)	PCA 32(8)		FSA 130.7(1), 130.7(2)	CLA 45	FMA 42	CLRA 39		CLA 29	
Information as to Address	CCEA 13		FRA 37.1, 37.2, 37.3	FSA 122	CLA 46	FMA 34	CLRA 40	CJEA 25	CLA 28	CA 48
Access Denial: Reimbursement of Expenses	CCEA 14.1(1)(a)				CLA 41(2)(c)				CLA 27	
Access Denial: Supervision	CCEA 14.1(1)(b)				CLA 41(2)(b), 40		CLRA 35 (general)		CLA 26(1)(b)	CA 35 (general)
Access Denial: Compensatory Access					CLA 41(2)(a), 41(3)				CLA 26(1)(a)	

COMPARISON OF PROVINCIAL ACCESS ENFORCEMENT LEGISLATION

	MANITOBA	ALBERTA	BRITISH COLUMBIA	NEW BRUNSWICK	NEWFOUNDLAND	NOVA SCOTIA	ONTARIO	PRINCE EDWARD ISLAND	SASKATCHEWAN	YUKON
Access Denial: Mediation					CLA 41(2)(d), 37				CLA 26(1)(d), 10	
Access Denial: Security by Respondent									CLA 26(1)(c)	
Access Denial: Vary Custody/Access									CLA 26(1)(e)	
Access Denial: Defences					CLA 41(4)				CLA 26(3)	
Non-exercise of Access: Reimbursement of Expenses	CCEA 14.1(2)(a)				CLA 41(6)(b)				CLA 27	
Non-exercise of Access: Supervision	CCEA 14.1(2)(b)				CLA 41(6)(a), 40		CLRA 35 (general)		CLA 26(2)(a)	
Non-exercise of Access: Mediation					CLA 41(6)(c), 37				CLA 26(2)(c), 10	
Non-exercise of Access: Security by Respondent									CLA 26(2)(b)	
Non-exercise of Access: Vary Custody/Access									CLA 26(2)(e)	

COMPARISON OF PROVINCIAL ACCESS ENFORCEMENT LEGISLATION

	MANITOBA	ALBERTA	BRITISH COLUMBIA	NEW BRUNSWICK	NEWFOUNDLAND	NOVA SCOTIA	ONTARIO	PRINCE EDWARD ISLAND	SASKATCHEWAN	YUKON
Mediation (general)	QBA 47			FSA 131	CLA 37		CLRA 31		CLA 10	
Assessment (general)	QBA 49		FRA 15	FSA 8	CLA 36, UFCA 16	FMA 19	CLRA 30, CJA 125(1)			CA 43

KEY TO TABLE

Manitoba: FMA: The Family Maintenance Act, R.S.M. 1987, c. F20
CCEA: The Child Custody Enforcement Act, R.S.M. 1987, c. C360
QBA: The Court of Queen's Bench Act, R.S.M. 1987, c. C280

Alberta: PCA: Provincial Court Act, R.S.A. 1980, c. P-20

British Columbia FRA: Family Relations Act, R.S.B.C. 1979, c. 121

New Brunswick: FSA: Family Services Act, S.N.B. 1980, c. F-2.2

Newfoundland: CLA: The Children's Law Act, S. Nfld. 1988, c. 61
UFCA: The Unified Family Court Act, S. Nfld. 1977, c. 88

Nova Scotia: FMA: Family Maintenance Act, R.S.N.S. 1989, c. 160

Ontario: CLRA: Children's Law Reform Act, R.S.O. 1980, c. 68
CJA: Courts of Justice Act, S.O. 1984, c. 11

P.E.I.: CJEA: Custody Jurisdiction and Enforcement Act, R.S.P.E.I. 1988, c. C-33

Saskatchewan: CLA: The Children's Law Act, S.S. 1990, c. C8.1

Yukon: CA: Children's Act, R.S.Y. 1986, c. 22

24c

Both the Newfoundland and Saskatchewan legislation closely mirror legislation which the Ontario government introduced in 1988 as Bill 124. That same year the federal - provincial Family Law Committee (a committee of representatives from each of the federal, provincial, and territorial department of justice) endorsed a "Uniform Custody and Access Jurisdiction and Enforcement Act", which contains many of the same provisions as the Ontario bill.

The Ontario legislation provided a summary and extraordinary remedy for access denial by permitting the non-custodial parent to file a motion for relief, to be heard within ten days after service by oral evidence only. Affidavit evidence would only be permitted with leave of the court. (Motions are normally argued on affidavit evidence only. This procedure is usually more expedient and cheaper for the court, but more costly and time-consuming for the litigants.)

To remedy an established access denial, the court could order compensatory access, supervision, reimbursement of "any reasonable expenses actually incurred as a result of the wrongful denial of access" or appoint a mediator.

Apparently as a matter of reciprocity, the bill also provided for a custodial parent to make the same kind of application to

the court when the non-custodial parent failed to exercise access or failed to return the child as required. To remedy the access failure, the court could order supervision, mediation, or a reimbursement of expenses incurred as a result of the access failure.

The proposed act also listed a number of defences the custodial parent could raise to justify the denial of access, such as illness of the child.

The *Uniform Custody and Access Enforcement Jurisdiction Act* does not provide for the summary procedure of the Ontario bill, but it did add an additional remedial measure for both custodial and non-custodial parents: the posting of security by the respondent to ensure compliance with his or her obligations.

The Ontario legislation was never proclaimed, and after the New Democratic Party government took power in 1989, it was announced that it never would be.

The Newfoundland legislation contains the same remedial measures as the dead Ontario bill, while the Saskatchewan bill also includes the posting of security and specifies that the court may also make or vary a custody order. On the other hand, while the Newfoundland provisions incorporate the summary proce-

dures of the Ontario bill, in Saskatchewan apparently an aggrieved party must apply in the ordinary way.

In contrast, the Manitoba legislation simply provides for orders of reimbursement or supervision for either failure or denial of access.

Manitoba's remedies, indeed all the remedial measures set out in the more extensive legislation, are all remedies which a superior court can grant in the exercise of its inherent jurisdiction. For example, in Yunyk v. Judd, the Manitoba Court of Queen's Bench did not require statutory authority to under compensatory access. Thus to some extent the debate over what remedial measures ought to be included in the legislation is academic: the manner of proceeding is more the issue.

In addition to the specific and recent access enforcement provisions the various statutes also generally contain penalties for non-compliance with custody and access orders. In Manitoba, the maximum fine is $500 and the maximum jail term is six months. In Alberta, the maximums are $1,000, and four months, and in New Brunswick, Newfoundland, and Ontario, $1,000 and 90 days. The Saskatchewan act provides for a maximum of $5,000 and three months on the first offence, and $10,000 and two years on the second.

IV. SURVEY OF THE LITERATURE AND CONCLUSION

Appendix C contains an annotated bibliography of the literature on access enforcement. The striking thing that emerges from the survey of the literature in this area is the almost universal condemnation of existing remedies for access enforcement, and the almost total lack of empirical research to measure the extent and nature of the problem, and the effectiveness of the remedies employed. One is left with the impression that the courts operate more or less in a vacuum, with little in the way of solid data or policy to guide them in their deliberations.

It is only to be hoped that the evaluation of the Manitoba access assistance program will at last provide some meaningful data to shed some light on effective ways to deal with the enforcement of access.

APPENDIX A
ANNOTATION OF CANADIAN CASES ON ACCESS ENFORCEMENT

1. SPECIFIED ACCESS

Hefler v. Hefler (1973), 14 R.F.L. 274 (N.S.S.C.) The original access order set out in the divorce decree was fairly specific but it did allow for some flexibility. Access worked satisfactorily for the first few months but thereafter even the limited flexibility proved too much and problems in exercising access were being experienced by the father. As a result, the court varied the order to make access extremely specific with no allowance for flexibility.

Charlton v. Charlton (1980), 15 R.F.L. 18 (Ont. S.C.) The custodial mother had been less then cooperative in granting access to the father. The father applied for a change in custody or, in the alternative, specified access and joint guardianship. The court refused to change custody because even though the mother had been uncooperative concerning access to the father, the court found that she was a good mother and did not want to remove the children, who had lived with her for 18 months. The court did define the access more precisely and awarded joint guardianship so that each party would have "a full and active role in providing a sound moral, social, economic and educational environment" for the children.

Hewlin v. Hewlin (1981), 30 Nfld. & P.E.I.R. 340 (Nfld. S.C.) The father was seeking custody of three children who had been in the mother's lawful custody for four years since the divorce. The father had not been in a financial position to apply for custody earlier. The trial judge, while applauding the father's efforts, refused to change custody because there was no reason to do so - the mother was taking good care of the children. However, the mother had been uncooperative regarding access to the father because she didn't like the father's new girlfriend. The court ordered specific access and warned the mother that any further interference would be a mark against her in subsequent custody disputes.

Wheatley v. Flynn (1983), 30 R.F.L. (2d) 263 (Ont. Prov. Ct.) The father of the child was married to another woman at the time the child was conceived. The mother was his secretary. By agreement, two months after the child was born, the father and his wife took custody of the child. The mother was to have lib-

eral access. The father decided the mother's attempts at access were an interruption of his family life and obstructed her efforts. The court said the custodial parent has a duty to ensure respect and affection for the non-custodial parent and ordered specified access of one day a week (the day to be agreed on by the parties) from 9:30 a.m. to 6:30 p.m.

Robinson v. Robinson (1985), 48 R.F.L. (2d) 264 (Ont. H.C.) Following separation the father had exercised his access rights until the mother and her new husband spirited the children, who were age two and three at the time, out of the jurisdiction. The mother and her husband made a concerted effort to have the girls forget the father and believe that the husband was the actual father. The father spent seven years trying to have his access rights enforced. The mother applied to terminate access. At the time of her application, the girls apparently did not remember their real father. Nevertheless, the judge felt that it was in the children's best interests to know the father and granted an order for specified access.

Adams v. Adams (1987), 6 R.F.L. (3d) 299 (N.S.S.C.) The father sought an order of joint custody of the two and a half year old girl, or in the alternative, increased access because the mother would not agree to overnight access. The court found that the mother was overprotective and, although joint custody is an appropriate remedy in some cases, it would not be in this case because of the parties' inability to coóperate. Despite the court's "great dislike and distaste for having to determine specific details as to access", this was the appropriate course of action in this case because of the history of the couple.

See also **Rose v. Rose** in Section 5, Change in Custody, *infra*.

2. <u>SUPERVISED ACCESS</u>

Sadowski v. Sadowski (1977), 25 R.F.L. 240 (Ont. S.C.). The mother was granted custody of the infant daughter. She sought an order denying all access to the father because of: his violence (the parties separated after a "vicious and violent" assault on his wife in which he threatened her life); his fondness for pornographic material; and the girl's disinclination to see him (the girl was 11 at the time of the application). Notwithstanding the mother's objections, the court ordered supervised access - three hours, once per month on 48 hours notice in the company only of a named minister.

Rutherford v. Rutherford (1986), 4 R.F.L. (3d) 457 (B.C.S.C.). By the terms of the divorce, the father had reasonable access to the

child. The father was out of the country for the next approximately year and a half and saw little of the child. Upon his return, he attempted to resume access which was resisted by the mother and her new husband. The court ordered supervised access and an access report. The evidence was conflicting. The mother and her husband alleged that the child, now seven, was greatly disturbed by the visits. The father denied this. The access report was limited but raised concerns about the father. The child indicated that she wished to continue to see the father. A psychiatric report on the father was "very guarded". The court ordered the continuation of the specified access, saying it could do nothing more definitive without more expert input and viva voce testimony.

3. SUSPENSION OR CANCELLATION OF SUPPORT PAYMENTS OR ARREARS

Shoot v. Shoot, [1957] O.W.N. 22 (Ont. C.A.). A separation agreement contained detailed access provisions. The mother moved the child from Toronto to Florida, and in response the father stopped paying maintenance for the child. The mother sued for the arrears. The father alleged that her move effectively prevented him from exercising access and therefore she had breached the agreement nd he was no longer obligated to pay. The court held the mother had breached an implied term of the agreement, stating at 24, "The agreement should be construed as containing the implied term that the wife would not do anything unreasonably that would prevent the husband having the frequent access to his child for which the agreement provided." The court held that there was interdependence between the usual mutual covenants in the agreement, i.e. the maintenance provision was not severable from the access provision. The mother's action for the arrears was dismissed.

Vickell v. Vickell (1970), 3 R.F.L. 257 (Man. C.A.).The facts of this older Manitoba case, which deals with a husband's liability to support his separated wife's child under the old Wives' amd Children's Maintenance Act where the wife had interfered with access, are not important here, but the case is often cited as authority for the principle that denial of access does not relieve a husband of his obligation to pay maintenance, and for the principle that access and support are independent obligations. Per Dickson, J.A. (as he then was):

> "Counsel for Mr. Vickell takes the position that a husband's obligation to provide maintenance payments for a child born to his wife prior to marriage is contingent upon a quid pro

quo existing at the time of making such payments. We cannot accept this argument. Led to its logical conclusion, it would simply mean that a husband would be relieved of the obligation of paying maintenance for his children if, as is frequently the case, he were denied access to those children by the wilful act of his wife or by order of the court. The Wives' and Children's Manitenance Act recognizes nor such exception to the general rule that a man is legally liable to maintain his children and the children of his wife."

Wright v. Wright (1973), 1 O.R. (2d) 337, 40 D.L.R. (3d) 321, 12 R.F.L. 200 (Ont. C.A.). The mother moved out of the province with the children ten months after the execution of a separation agreement giving the father reasonable access and which specified the mother could "reside at such place as she shall think fit...". The father stopped paying support on the basis she had breached the agreement. The mother successfully sued for the maintenance arrears. The court said she had not breached their agreement as it contemplated her moving out of the jurisdiction. However, the court went on to say that, even if the mother had violated the agreement, the father was not entitled to stop paying support. The court stated, at 325 : "...a parent cannot avoid payment of child maintenance because of inability to exercise his right to access."

However, the court indicated the result may be different where the separation agreement contains detailed access provisions and the court can regard a denial of access as a violation of the agreement. As Evans, J.A. stated:

> The applicable law may be summarized as follows: Absenting all consideration of unreasonableness, which, in the circumstances of this case is not a factor the parent who has custody of children has the right to remove the children without the permission of the other parent in the absence of some specific agreement to the contrary or in the absence of some specific terms with respect to access as would clearly indicate that the parties must have intended that the children remain in close proximity if the specified right of access provided in the agreement was to be an effective right. If, for example, the agreement provided that the parent who does not have custody should have a right of access to the children for a period of several hours on each Saturday, I would be of the view that one could imply a term that the parties intended that the children should reside within such proximity to the parent having access that the specific right of access granted might be implemented without undue inconvenience to such parent.

(A) Cases where courts have declined to order variation or suspension of maintenance where access denied or frustrated:

Dahlin v. Dahlin, [1980] Man. D. 1631-04 (County Court). The mother sued for support arrears under a separation agreement. The father claimed he was excused from paying because the mother had breached the agreement by denying him access. The court accepted that the mother's lack of cooperation and attitude amounted to a denial of access. However, the court held that the the access provision was severable from the rest of the agreement and also noted that the husband had failed to take any proceedings to enforce his access rights. The wife was accordingly granted support arrears.

Patton v. Patton (1982), 27 R.F.L. (2d) 202 (N.S.S.C. Trial Div.). The access parent, the father, applied to reduce child maintenance, both because of his changed financial circumstances and apparently because of difficulties with access. The maintenance was reduced but the court made it clear that this was unrelated to any access problems, saying, at 206: "The interest of the children is a paramount consideration and they require maintenance which should not be reduced because the custodial parent has prevented the payor from access to the children." The access issue is not otherwise discussed in the report.

Twaddle v. Twaddle (1985), 68 N.S.R. (2d) 230, 159 A.P.R. 230, 20 D.L.R. (4th) 459, 46 R.F.L. (2d) 337 (N.S.S.C.App. Div.). The husband applied to reduce maintenance on the grounds of alleged access difficulties. By the terms of a settlement agreement, incorporated in their decree nisi, the wife had custody of the three children and the husband had reasonable access. The trial judge accepted that the mother had "embarked upon a planned and deliberate scheme to alienate these children from their father", forgave arrears of maintenance, reduced child support, and ordered that payments for the two older children be made to a trust fund to be administered by the father. The wife appealed.

On appeal the husband attempted to overcome the non-linkage principle by distinguishing this case on the basis the wife was employed and didn't "require" the child support and therefore the remedy was appropriate for the interference with access. The court emphatically rejected using child support as a method of enforcing access, stating, at 345:

> In theory, child maintenance should not be linked to any other form of relief but must stand alone and independent of

> all other rights and obligations vis-a-vis the parties. To permit even the slightest erosion of such principle is to create, potentially, a situation where the children of the marriage will suffer. As a matter of principle, therefore, I do not agree with the contention...that if the wife is financially independent then child maintenance may properly be ordered suspended to effect compliance with an access order. In other words, it matters not, in my view, that the wife who has custody of the children can support them independent of any financial contribution from the husband. If he had been ordered to pay child maintenance, then under no circumstances should such be ordered withheld or rescinded because of interference with his access rights by the mother.

Respecting child support, her conduct and financial position were irrelevant. The court did suggest, however, that withholding spousal support might be used as a remedy for access violations: "...the conduct of the wife that rendered difficult, perhaps impossible, the exercise of the husband's right to access could bear the sanction, perhaps, of staying maintenance payments to her." The appeal was allowed: support was restored to its former level, and the arrears were ordered to be paid to the wife.

Turecki v. Turecki (1989), 19 R.F.L. 127 (B.C.C.A.).When the parties divorced in 1978, custody of the four children was awarded to the mother, with reasonable access to the father. In 1981, access difficulties resulted in litigation respecting the youngest child, then aged seven. (The three other children were in their late teens at the time of the divorce and access to them was apparently not an issue.) In contravention of an order not to remove the child from British Columbia, and in the face of an order that she be apprehended and brought before the court to answer a contempt motion for her refusal of access, the wife surrepticiously moved to Alberta with the son. She hid their whereabouts from the father and did not pursue support payments for the next five years because she was afraid the father would find them if she did. The father stopped paying support after she disappeared.

In 1986, the mother, having exhausted her substantial marital property settlement, instigated the son to write to the father for money. She then applied to the court to enforce the arrears and increase support and the father applied to remit the arrears. Access was no longer an issue as the son refused to see the father. The mother was now living at a subsistance level and the father was well-off financially. The trial judge held that the mother was estopped by her conduct from claiming the arrears and ordered support to continue at the previous level.

On appeal, the court agreed the mother was not entitled to the arrears, stating, at 133:

> Insofar as her activities have resulted in her bearing the cost of maintaining her son in such circumstances and thereby encroaching upon her capital, it was a self-inflicted injury. She assumed the increased responsibility for maintenance payments as a necessary incident of denying her husband the opportunity of forming a relationship with his son and of thwarting the orders of the court.

However, the majority of the appeal court did increase the amount of child support. In doing so, the court distinguished between the "misconduct of the custodial parent" and the "misconduct of the child", the latter being the son's refusal to see his father. With respect to the mother's denial of access, the court refused to relate child support to parental misconduct. The court stated, at 134:

> The payment of ongoing child maintenance raises a different principle to that of payment of the arrears of maintenance. Counsel for the appellant submits that the child should not suffer because of the improper conduct of the custodial parent. I agree. It is the obligation of the father to contribute to the proper maintenance of his child. If the court fails to vary maintenance payments so as to reflect the current cost of maintaining a 14 year-old-child, it is the child who will bear the brunt of his mother's misconduct. In my opinion, child support is the right of a child and it may not be eroded or qualified by reason of the misconduct of the custodial parent.

Regarding the son's intransigent attitude, the court indicated a willingness to consider changing child support in some circumstances, although not where the child is still in secondary school, as here. Wallace, J.A., stated, at 135:

> I have every sympathy with the view that with the privilege of receiving support from a custodial parent there goes a correlative responsibility on the part of the child who is the recipient of such support to do what he reasonably can in the circumstances to encourage the development of a normal relationship with the parent who is contributing to his support. However, to conclude that such an approach on the part of a child still in secondary school is a prerequisite to the obligation of the non-custodial parent to pay appropriate maintenance would, in my opinion, set down a principle which could have detrimental consequences in that it would erode the basic principle that a child is entitled to adequate maintnenance from his parents regardless of problems associated with access. The mutual obligation of the parents to properly maintain the children of the mar-

> riage according to their need should not be qualified or made less certain by reason of interspousal disputes respecting access or by the recalcitrant attitude of the children themselves.

Southin, J.A. in the minority refused to increase child support on the basis of questions about the mother's means and the child's expenses. Her reasons indicate that, if she had felt legally free to do so, she would have eliminated child support altogether on the basis the mother had repudiated the separation agreement by her malicious conduct respecting access. At 139, she commented: " The case before us is one in which to the extent the law permits, the sins of the mother should be visited on the child both as a warning to other custodial parents tempted to the same course of action and as a sign to the boy himself that evil does not triumph, at least in the courts of Canada." However, she was of the opinion that under the Divorce Act, 1985 a support order cannot be refused because of the custodial parent's conduct.

Lee v. Lee (1990), 29 R.F.L. (3d) 417 (B.C.C.A.). By the terms of their separation agreement incorporated in the decree nisi, the mother had sole custody and the father had reasonable access to the two children. Upon the father's application, specified access was later ordered but not complied with.The children, now 14 and 9, refused to visit out of fear of their father. The father then applied for a reduction of maintenance until the mother facilitated access. The father did not pursue access after an access report confirmed the children's fear of him, but he continued with his request for a reduction in support. The trial judge allowed the father's maintenance application, commenting that the mother made a "major contribution" to the access problem. The mother appealed. The appeal court dismissed the father's application on the grounds that there was no change in circumstances to justify a change in child support, the trial judge had prejudged the issues, and he had "confused access with maintenance", adopting Turecki (supra).

(B) Cases where courts have ordered variation or suspension of maintenance or cancellation of arrears where access denied or frustrated:

Shoot v. Shoot ***supra.***

Kett v. Kett and Mitchell (1976), 13 O.R. (2d) 27, 28 R.F.L. 1 (Ont. H.C.). The mother moved with the children from Ontario to

Saskatchewan without notice to the father thereby frustrating his access rights under their decree nisi. The court suspended support payments until the mother made satisfactory arrangements for the husband to exercise his access rights.

Martin v. Martin (1976), 31 A.P.R. 303 (N.S.C.C. Trial Div.). The divorce decree gave the mother custody, spousal and child support, and the father specified access. It also provided that neither could permanently remove the son from Nova Scotia without a court order. Without notice to the father the mother moved with the son to Saskatchewan and the father stopped paying child support. At that time, the father applied to the Nova Scotia court to vary custody, but he subsequently consented to an Alberta court order permitting the son to stay with the mother, then resident in Alberta, allegedly because of the cost of opposing the Alberta proceedings. The husband applied to reduce support. The court concluded that the reference to conduct in Section 11 of the 1968 Divorce Act "encompasses the conduct of the wife in the present case in removing the son covertly from the Province of Nova Scotia, resulting in a virtual extinguishing of the husband's right of access." The court noted the husband's increased cost of access and ordered a reduction in spousal maintenance.

Tassou v. Tassou (1977), 28 R.F.L. 171 (Alta. S.C.) The father exercised access on two occasions. On the third, the three boys refused to see him. The mother said she had not influenced the boys against their father but the court felt that she probably applied subtle pressure since the second and third visits were only two weeks apart. The court said the mother had a positive duty to try to facilitate access. As a way of inducing the mother to fulfill this positive duty, maintenance payments were suspended by the court until such time as the father could exercise access.

Pickard(Coffin) v. Coffin (1980), 16 R.F.L. (2d) 380 (P.E.I.S.C.[Fam. Div.]). The mother applied for an order of contempt against the father for failure to pay maintenance. The decree nisi gave the mother custody of the two sons and the father access. The mother moved from Prince Edward Island to Nova Scotia without notice to the father making it virtually impossible for him to exercise access and he stopped paying support in the honest belief that he was no longer obligated to pay. While the court dismissed the contempt motion, the court pointed out that he should have applied to court and "if the court was satisfied that its order for access had been frustrated without just cause it could suspend maintenance payments until the (mother) made satisfactory arrangements for the exercise by the (father) of his access rights" (at 384). All arrears were can-

celled but for reasons unrelated to the access issue. In varying maintenance, however, the court explicitly took into account the frustration of access and the wife's changing the children's family name from the father's.

Casement v. Casement (1986), A.W.L.D. 1388, [1986] W.D.F.L. 1986, and (1987), 9 R.F.L. (3d) 169 (Alta Q.B). Pursuant to the decree nisi in 1985, the mother had custody of the three children and the father had reasonable and specified access. Although the father had a good relationship with the children prior to the separation, they became alienated from him due to the mother's influence. The father had virtually no contact with the children and applied to the court in 1986 for custody. The court ordered: that a psychologist be appointed as counsellor for the father and the children, that a fixed number of counselling sessions take place, that the mother deliver the children to the counsellor's office for the sessions, and that the matter be reviewed by the court on either party's application in approximately six months time.

Due to the children's hostility to the father and their lack of cooperation, engendered by the mother, only one abortive counselling session with the children took place. When the matter returned to court in 1987, the court declined to order a change in custody in light of the children's estrangement from the father. The children were then 17, 14 and 9. The court decided that the usual means of enforcement - proceedings for contempt and change in custody - were not feasible since the children as well as the mother were now defiant. The court affirmed the principle that child maintenance cannot be linked to access and said that a reduction or elimination of child support could not be considered. The court ordered that the father pay the fees of any access counselling the children would agree to, and ordered that, until the father was enjoying reasonable access with a child, maintenance for that child would be suspended. It is to be noted that there is nothing in the reasons for decision indicating the court considered the financial circumstances of the mother.

Brownell v. Brownell (1987), 9 R.F.L. (3d) 31 (N.B.Q.B. F.D.).The mother had custody of the three children aged 12, 10 and 6 at the time of the divorce. The father had severe difficulties with access fron the outset, resulting in three applications to the court by him over this issue since the separation in 1981. On the first two occasions, the court harshly criticised the mother for her behaviour and warned her that she could be held in contempt. Despite this, the mother continued to conduct a "protracted and deliberate campaign to obstruct all attempts by the (father) to

have a meaningful relationship with his children." On this third occasion, the father was asking the court to hold the mother in contempt and to terminate child support. The court found the mother in contempt and suspended all maintenance payments until such time as meaningful access was established with the youngest child. The court acknowledged the judicial reticence to terminate support when access is interfered with, but stated this was an unusual case in that the father had done everything legally possible to see the children and the opportunity for a meaningful relationship had "probably passed". The court noted, at 36:

> The change in circumstances normally incipient in these applications refers not only to changed financial circumstances, but also to any other circumstances which the court finds relevant and weighty. To ignore the history of disruptive conduct in this case where the applicant has been prevented from exercising his legitimate right to have access to his children would be to do a grave injustice to him. The respondent's conduct has frustrated the order of the court and, she cannot, on the one hand, claim maintenance for the children and, on the other hand, refuse access. That, in my view, is a circumstance which has changed from the intended purpose of the access provisions. Having frustrated access, the respondent is not now able to claim support regardless.

It is to be noted that the court was not concerned that the children's standard of living would necessarily suffer due to the suspension of child support because of the mother's own income. (The court's conditioning of child support on the establishment of access to the youngest child is somewhat peculiar in that the court agreed with the father that "any further attempts to compel the (mother) to abide by the access order will only result in the child suffering all the consequences," at 37).

Harrison v. Harrison (1987), 10 R.F.L. (3d) 1 (Man. Q.B. Fam. Div., per Bowman, J.).(See also unreported decision of Helper, J. delivered June 29, 1988, Suit No. 85-01-00422 (Man. Q.B. Fam. Div., discussed infra Section 7 Other Remedies). This case involved numerous motions and orders over a four year period since the parties' final separation in 1984 respecting access to their two children in the mother's custody. At one point, because of access problems arising from the mother's intransigence, the court required the mother to deliver the children to the father and maintenance was suspended. Access worked reasonably well for a period following this order. In June, 1987, a divorce was pronounced providing for specified access, but the former conditions were removed. Access problems resumed again. The father then

brought a motion for contempt and to vary custody. The court found as a fact that the mother had engaged in a "pattern of conduct" which satisfied the court that "she has behaved in a manipulative and vindictive fashion in respect of access by the father to his children". The court ordered an assessment report as to access and the desireability of a change in custody, the mother was again required to deliver the children to the father for visits, and if the wife failed to deliver the children for any reason except illness (the latter to be confirmed by medical certificate), then maintenance was to be forgiven on the next payment due. The court noted that while it was unusual to tie support and access, she felt it was necessary to provide sufficient motivation to the mother and the court was satisfied the children would suffer no deprivation if the father did not pay maintenance. (The matter came on before Helper, J. (as she then was) the following year. Justice Bowman's order had apparently not been the solution, as the denial of access continued. In her reasons, Justice Helper does not advert to the question of maintenance at all. See infra Section 7 Other Remedies).

Turecki v. Turecki *supra*. where custodial parent was denied recovery of arrears.

Gillies v. Gillies (1990), 27 R.F.L. 53 (B.C.S.C.). The parties entered into a separation agreement giving the wife custody and the husband reasonable access to the child, and prohibiting either from removing the child from British Columbia without the other's consent. Three years later after the divorce, the wife surreptiously moved with the child to England without notice to the husband. The parties then entered into a consent order, confirming custody with the mother with reasonable access to the father. The father applied in B.C. to reduce maintenance and cancel arrears. Quoting **Twaddle** and **Turecki (supra)**, the court said it was satisfied the mother's misconduct in breaching the agreement was not grounds to terminate or reduce child support. The court did reduce maintenance not only because of the father's reduced income and new family, but also because the wife's move meant greatly increased access costs for the father. The order "must accommodate, if at all possible, the continuation of the relationship" between the father and the son. Arrears were cancelled in proportion to the new level of support.

4. CONTEMPT

A. Cases where access frustrated or denied but no findings of contempt:

Singer v. Singer (1974), 17 R.F.L. 18 (Ont. H.C.) The father applied to commit the mother for contempt for denial of an access order respecting their two children. The court held that to constitute contempt there must be a wilful refusal to comply with access. The court was not convinced that the mother wilfully refused access on the first occasion complained of, saying the facts were equally consistent with a confusion over dates. On the second occasion, the father went to the mother's home to pick up his son for a two week holiday. The mother had the boy's bags packed to go with the father and she invited the father to come in to talk to the boy but he refused. The boy said he didn't want to go and the father left. While the court suggested the mother physically forcing the child out of the door might be appropriate as a last resort, the court said she was not obliged to do so in these circumstances. The father should have talked to the boy. There must be a wilful refusal on the part of the custodial parent for a finding of contempt and here there was no such wilful refusal and therefore no contempt.

Racette v. Racette (1976), 27 R.F.L. 299 (Ont. H.C.). The mother moved to have the father committed for contempt for disobedience of access provisions of a decree nisi. The 14 1/2 year old son told the judge that he did not wish to see his mother. The court dismissed the motion on that basis. The judge added that he did not think he could force a child of that age to meet with his parent.

Genua v. Genua (1980), 12 R.F.L. 85 (Ont. Prov. Ct.) The father brought an application to have an access order enforced and, although the application was not specifically framed in contempt, he also sought to have the mother found in contempt for disobeying the order. The children were aged 11, 14, and 15. The court found no evidence that the mother had wilfully obstructed access - most of the evidence related to the children's refusal to see their father. The court also said that she was under no obligation to force them to go so no order for contempt was made. In this case, even if the court had found wilful interference on the mother's part, the judge said he would not have committed her to jail because, according to the family court clinic and counsel for the children, they legitimately did not want to go. The court also refused to enforce the access order because, in all of the circumstances of the case, including the children's desire not to see their father, the court held that it would not be in

the children's best interests for them to be forced to visit. This case emphasizes that the court should only use contempt with great caution in a custody/access dispute because the "court system will survive a breach of one of its orders. However, the emotional well-being of the children described by that order is much more fragile and must be protected. A contempt proceeding must not be allowed to become an extension of the dispute which led to the breakdown of the family unit" (at 91). After canvassing the law of contempt, the court sets out six basic propositions, at 91 and 92:

> (1) The orders must be served upon the respondent: **Desilets v. Desilets** (1975), 21 R.F.L. 297 (Man. C.A.); at the very least, the respondent must have had reasonable notice of the provisions of the order: **Re Saxon** (1975), 20 R.F.L. 340 (B.C.S.C.).
>
> (2) There must be a wilful refusal to comply with the provisions of the order: **Singer v. Singer** (1984), 17 R.F.L. 18 (Ont. H.C.).
>
> (3) The wishes of the child, in relation to his or her age, may be a determining factor: **Racette v. Racette** (1976), 27 R.F.L. 299 (Ont. H.C.).
>
> (4) The custodial parent does not have to physically force the child to participate in the access: **Singer v. Singer** *supra*.
>
> (5) The contempt process should be used sparingly and with a view to protecting the administration of justice: **Gribben v. Gribben** (1972), 9 R.F.L. 114 (B.C.S.C.).
>
> (6) It is a serious thing to commit a parent to jail for failure to comply with an access order. If left with no alternative the court must exercise its jurisdiction: **Re Petryczka v. Petryczka**, [1973] 2 O.R. 866, 10 R.F.L. 321, 35 D.L.R. (3d) 526 (H.C.).

Hayes v. Hayes (1981), 43 N.S.R. (2d) 349 (S.C.) The applications for contempt were mutual - the father wanted the mother found in contempt because she denied him access; the mother wanted the father found in contempt because he didn't pay maintenance. The mother was not found in contempt but the father was because his refusal to pay maintenance had the necessary wilful quality (he was trying to force the mother to sell the matrimonial home). The judge signed an order for incarceration of the father until the contempt was purged if he didn't pay all

the arrears and intervening payments by a specified date. The mother denied access to the father on a number of occasions because he was not paying maintenance and because he was foul and abusive in front of the children when he came to pick them up. The father wanted the mother cited for contempt. The court found that she did not have the necessary mental attitude (involving wilful disregard) to be held in contempt. The court emphasized that denial of access should not be used by the custodial parent to enforce maintenance but in this case it was not simply the lack of maintenance that provoked the mother into denying access. The court warned the mother that if she refused access when the husband was conducting himself in a proper manner and refraining from verbal and other forms of abuse, she may well be held in contempt or face loss of custody because such interference may reflect unfavourably on her concern for the best interests of the children.

MacKenzie v. MacKenzie (1985), 42 R.F.L. (2d) 211 (N.S.S.C. App. Div.) The parties were divorced in Nova Scotia with custody of the two children going to the mother and reasonable access to the father. The mother subsequently remarried and moved to Alberta. The father got an access order in Nova Scotia allowing him to have the children with him in Nova Scotia for three weeks in the summer (with him paying the airfare). The mother was uncooperative with the arrangements he proposed (which would have involved her driving the children 300 miles to the airport) but she did not refuse to allow him access. The father sought to have the mother found in contempt. The trial judge (upheld by the court of appeal) did not find her in contempt because being somewhat uncooperative does not constitute contempt. (The court of appeal also raised the jurisdictional question of whether she could be held in contempt of a Nova Scotia order which was not properly registered in Alberta but this point was not argued so the case was disposed of on the merits).

B. Cases where contempt found but no remedy or penalty imposed:

Gribben v. Gribben (1973), 9 R.F.L. 114 (B.C.S.C.) The mother had engaged in "despicable" conduct designed to sever the father's relationship with their six year old child. The father applied to have custody changed to him and to have the mother found in contempt. The mother was found in contempt of the court order but not punished because the court found that she was so "emotionally deranged" in her attitude toward the father and access that she did not realize that her behaviour was in defiance of a court order. The court noted that the "process of contempt should be used sparingly and with a view to protecting

the administration of justice." The court decided not to change custody at this time but if the mother persisted in her behaviour, this would weigh heavily against her in subsequent proceedings. The court ordered specified access.

C. Cases where no ruling of contempt but some remedial order:

Harrison v. Harrison (1987), 10 R.F.L. (3d) 1 (Man. Q.B.Fam. Div.) See *supra* Section 3 Suspension of Support Payments. The father brought a motion seeking to have mother held in contempt for her failure to conform with the access order. The court decided to condition maintenance on access instead because this had worked for this couple in the past.

D. Cases where contempt found and remedies other than fine or imprisonment ordered:

Cillis v. Cillis (1981), 20, R.F.L. (2d) 208 (Ont. S.C.) The mother was found in contempt of the court order for refusing to allow access to the father. She could purge the contempt if she allowed a family assessment within one month. If she didn't, the court would make a further order. All payments by the father were stayed until the assessment occurred (the mother's affidavit indicated that there would be no financial hardship to the children).

Therrien v. Cote (1981), 32 N.B.R. (2d) 42 (Q.B.) The mother was granted custody of two boys following divorce. She denied access to the father and ignored his continual attempts to contact her, for example, she refused to accept delivery of registered mail. The mother was found in contempt. In order to purge her contempt she had to comply with a specified access order as set out by the judge. If the order was not strictly complied with, a Writ of Attachment would automatically issue from the court and the mother would be committed to prison for seven days.

Yunyk v. Judd (1987), 5 R.F.L. (3d) 206 (Man. Q.B.Fam. Div.) (*infra* Section 7(A) Compensatory Access) where the mother was denying access because the child was allegedly upset after visiting her father. The court held the mother in contempt and ordered specified make-up visits.

Brownell v. Brownell (1987), 9 R.F.L. (3d) 31 (N.B.Q.B. F.D.) (*supra* Section 3 - Suspension of support payments) where the court found the mother in contempt for persistent frustration of access and ordered suspension of child support until access was established with the youngest child.

E. Cases where contempt found and imprisonment or fine imposed:

Petryczka v. Petryczka (1973), 10 R.F.L. 321 (Ont. S.C.) There had been a series of court orders concerning access but the mother continually refused to allow it. The judge conceded that the mother "in all likelihood is sincerely concerned for the welfare of her children and for this reason has been reluctant to afford access to her husband as required by the successive orders." However, he also pointed out that the court had to make its displeasure at having orders disobeyed clear or there would be no way to persuade a person to obey them. He found the mother in contempt and committed her to jail for 24 hours, being satisfied that she could make arrangements for her children while she served her time.

Re Saxon (1975), 20 R.F.L. 340 (B.C.S.C.). The custodial father deprived the mother of Christmas access ordered by the court. He was found in contempt and committed to prison for ten days.

O'Byrne v. Koresec (1986), 2 R.F.L. (3d) 104 (B.C.S.C.) The mother refused access of the child to the father because she felt he was sexually abusing the child. This allegation had been investigated but had not been proven. Other contempt proceedings had been brought but no order had been made. The mother said that she would continue to deny access no matter what the court said. The court found her in contempt and fined her $350.00 or seven days in default.

Rawlinson v. Rawlinson (1987), 5 R.F.L. (3d) 166 (Sask. Q.B.) This case deals with repeated breaches of custody orders by the non-custodial parent and is only relevant here in that the court emphasized that contempt proceedings should be used sparingly and only for the protection of the authority of the court from improper interference. Contempt does not "exist for the protection of the personal dignity, honour or reputation of judges, but only for courts, and judges as judges." (at 174).

5. CHANGE IN CUSTODY

(a) Cases where court gave consideration to a change in custody:

Jones v. Jones (1970), 1 R.F.L. 295 (Ont. C.A.). The non-custodial mother applied for a change of custody because of

interference with her access rights. The trial judge refused to change custody and the court of appeal dismissed the mother's application. The court warned the father that if he was in fact interfering with access in the manner alleged, he was putting his continued custody in grave danger.

Gribben v. Gribben (1973), 9 R.F.L. 114 (B.C.S.C.). See *supra* Section 4 Contempt, where the court found the custodial mother in contempt, refused the husband's application for a change in custody, but warned the mother of this possibility if she persisted in her behaviour, and gave the husband specified access.

Woodburn v. Woodburn (1975), 21 R.F.L. 179 (N.S.S.C.). The mother was given custody of the two daughters of the marriage with specified access to the father. The father had fallen into substantial arrears in maintenance payments because he claimed that he was being denied access. He sought a variation of the order for access and maintenance. The court was not satisfied that he had been pursuing access as diligently as he said he was, nor was the court satisfied that the mother was denying access to the father although she did not appear to be cooperating in that regard either. The court dismissed the father's application but warned the mother that if she was in fact defying the access order, she risked being held in contempt of court or losing custody of the children.

Stein v. Stein (1977), 17 N.B.R. (2d) 566 (Q.B.) At the time of the divorce, custody of the daughter (then six years old) was given to the mother with access to the father. The mother continually frustrated the father's attempts at access despite court orders so that in the intervening four years, there had been very little contact between the father and the daughter (he lived in Moncton while the mother and child lived in Montreal). The father applied for a change in custody. The trial judge did not feel that it would be in the child's best interests to change custody at this time since there had been so little contact with the father. Therefore he ordered that the father have six weeks access to the daughter in his home over the summer. At the end of the six week access period, the judge would look at the question of custody and access again. At that time he would consider making a long-term change in arrangements.

Casement v. Casement, [1986] A.W.L.D. 1388, [1986] W.D.F.L. 1986 and (1987), 9 R.F.L. (3d) 169 (see *supra* Section 3 Suspension of Support Payments) where court declined to order a change in custody due to the children's defiance and alienation from the access parent.

MacKenzie v. MacKenzie (1987), 9 R.F.L. (3d) (Man. C.A.). Pursuant to a separation agreement, the mother had custody of the four children. The two oldest children eventually went to live with the father with the consent of the mother. In proceedings over this and other issues, the trial judge ordered that custody of the two youngest remain with the mother. On appeal, the court declined to change custody, despite the fact that the mother had not cooperated with the father respecting access. The court warned that continued failure to cooperate by the mother could result in a change of custody.

Legault v. Legault (1988), 93 A.R. 370 (Alta. Q.B.).The mother had custody of the daughter, now eight, since the divorce in Calgary in 1982. In 1984, the mother moved to Saskatchewan without notifying the father who was forced to look for them. In the summer of 1988, ignoring an agreement with the father that he would have the child for a family visit to Ontario, she moved with the child to Nova Scotia. She then breached a court order providing for that access. The father applied for a variation of custody. The court did not consider the two episodes of interference with access to be sufficient to justify a change in circumstances, and thus insufficient to justify a change in custody. However, in dismissing the father's application, the court warned that any further lack of cooperation in facilitating access would likely to be viewed by the court as a material change in circumstances of the child which could lead to the mother being deprived of custody.

Harrison v. Harrison (1988) unreported decision of Helper, J. delivered June 29, 1988 Suit No. 85-01-00422 (Man. Q.B. Fam Div.) *infra* Section 7 Other Remedies, where court considered and rejected a change in custody due to fears of the children's inability to adjust in the circumstances.

G.L.P. v. J.M.P. (1990), 27 R.F.L. (3d) 64 (B.C.S.C.). Upon separation, the mother was granted interim custody of the two children, now aged 6 and 3 and a half. The mother accused the father of physical and sexual abuse of the children and the father was given supervised access and an assessment report ordered. The psychologist reported that it was improbable the father had abused the boys. The mother continued to frustrate access and was found guilty of contempt. The mother was uncooperative with a further assessment ordered by the court. When the matter came on for trial in 1990, she consented to an unsupervised access order to be reviewed in three months. She continued to thwart access and seemed determined to sever the father's relationship with the children. The court warned if the situation persisted, the court would consider changing custody. The father had not applied for

custody at this point and the court ordered that the father continue to have unsupervised access to be reviewed in four months.

Note also **Friesen v. Friesen** (1989) unreported decision of Carr, J. delivered June 14, 1989, Suit No. 81-01-24245 (Man. Q.B. Fam. Div.) where the court declined to consider varying custody on affidavit evidence only. Despite non-cooperation with access admitted by the custodial parent and an expert report recommending a change in custody to the access parent (the father), the court was unwilling to change a long-standing status quo (eight years of custody with the mother) without viva voce evidence.

(B) Cases where change in custody was ordered:

Tremblay v. Tremblay (1987), 10 R.F.L. (3d) 166, [1987] 6 W.W.R. 742, 54 Alta. L.R. (2d) 283, 82 A.R. 24 (Alta. Q.B.) Upon divorce, custody of two boys was awarded to the mother with limited specified access to the father. The mother refused to allow access. The father applied to the court to have the mother held in contempt. The court ordered specified access. The mother refused again and again the father applied to have her held in contempt. Two subsequent orders of specified access were ignored by the wife. After a *viva voce* hearing and the judge had interviewed the children, a further order of specified access was made. The wife refused to comply. The father then applied to change custody and the court granted his application, stating, at 169, 170:

> Cases of this type, where the custodial parent is, without justification and in the face of a court order, denying access to the non-custodial parent, are problematical. If maintenance is being paid, the court can order that maintenance no longer need to be paid...The court can also find a custodial parent in contempt of court and fine the custodial parent or send the custodial parent to jail. However, neither of these alternatives does anything to further the development of a relationship between the custodial parent and the child. The child can still be convinced by the custodial parent that the non-custodial parent is an unfit parent and make the development of a relationship extremely difficult. Faced with such odds, I expect many non-custodial parents give up trying to see their children because they are disheartened by the difficulties in establishing a relationship or do not have the financial resources to persevere through the courts in an attempt to develop a relationship with their children. In many cases, the variation of the maintenance or the sending of the custodial parent to jail is not in the best interests of the

> children. Often the intransigent parent who has defied or at least not lived up to the court order ends up essentially being rewarded by being victorious in not allowing the non-cutodial parent access...
> The court should not automatically change custody if the custodial parent refuses access or otherwise interferes with the development of a normal parent and child relationship between the non-custodial parent and the child of the marriage. However, where the parent refuses access, serious questions are raised about the fitness of that person as a parent. The refusal to grant access after it is ordered is a change in circumstances sufficient to satisfy s. 17(5) of the (Divorce Act, 1985).
> In deciding questions of custody one needs to take into account the best interests of the child. It is in the children's best interests to live with the parent who is prepared to be co-operative with respect to access in cases where both parents can equally well look after the children or, even if there is a divergence in parenting skills, as long as the co-operative parent is fit to look after the children."

Here the court was satisfied the father was able to care for the children as well as the mother, and also that he would give the mother generous access.

Rose v. Rose (1989), 22 R.F.L. (3d) 72 (Alta Q.B.). After the parties separated in 1984, their two sons lived with the father and the mother had access. After some difficulties arose the husband was given interim custody and the mother, specified access. At trial in 1986 the parties agreed to an order, approaching though not called joint custody, giving the father custody, and the mother extensive specified access and other rights to be involved in the children's lives. The father followed the form of the order, if not the spirit, for the first year or so, and then started limiting the access. He even sold a house he had purchased before he moved in when he found out the mother had bought a house close by to be nearer to the children. Eventually, as a result of the father's deliberate denial of access, the mother was only seeing the children for supervised access four hours every four to six weeks. In 1989, the mother applied for custody of the two boys, now 13 and almost 11. The court held that "the unwillingness of a parent to facilitate contact between the children of the marriage and the non-custodial parent, in accordance with the terms of a custody and access order, if persistent, is an important factor in considering whether there has been a change in circumstances of the child, within the meaning of the divorce Act." Here the court found the father's deliberate erosion of contact between the mother and the

children was a sufficient change in circumstances to warrant a variation order if such an order was in the children's best interest. After considering the parties' relative parenting abilities, and especially the fact the oldest child clearly wanted to live with his mother, the court gave the mother custody of the older boy, leaving custody of the other boy with the father, and set identical terms of access so that, for example, both boys would be with the same parent every weekend.

6. CRIMINAL CODE

(A) Section 282 Abduction in Contravention of Custody Order

(a) Cases holding section does not apply to access violations:

R. v. Powless (1988), 18 R.F.L. (3d) 433 (Ont. P.C. Crim. Div.). This is an oral judgement and the facts are not detailed. The accused mother had custody of the child with the father apparently having specified access which she withheld. The court quashed the information holding that as a criminal statute, Section 282 (then 250.1) must be strictly interpreted, custody and access are "completely separate concepts", and the section "was meant...to limit it to the larger picture: a breach of the custody provisions, as opposed to any other provisions in that particular order, including the right of access."

(b) Cases holding section does apply to access violations:

R. v. Petropoulus (1990), 29 R.F.L. (3d) 289 (B.C.C.A.). A B.C. provincial court order gave the father sole custody of a seven year old, the mother reasonable access a minimum of three specified days a week including overnights, and prohibited either from removing the child from the jurisdiction without the other's consent or a court order. The father moved to Toronto to get work, taking the child with him in contravention of the order. He was convicted of parental abduction under Section 282 of the Criminal Code. His appeal was dismissed. The appeal court interpreted the term "custody provision of a custody order" broadly, holding that the non-removal clause came within the meaning of the term. The court also rejected the view that the person alleged to habe been deprived of possession of the child must have "custody or a right to custody". Depriving a person with access rights, at least rights involving actual transfer of possession of a child, is enough to bring the matter within the scope of the section. Respecting the issue of intent, the court

held that, whatever the father's purpose in going to Toronto, his intent was to deprive the wife of her access rights.

(B) Section 127 Criminal Contempt - Disobedience of a Court Order

R. v. Rupert (1975), 16 R.F.L. 325 (Ont. Prov. Ct.) The custodial mother was charged under Section 116 (now 127) with refusing to comply with a court order giving reasonable access to the father to their young daughter. The court found the mother had refused access with no excuse, but acquitted her on the grounds that the Crown had to show there "was no other mode of proceeding...expressly provided by law" and the Crown had not done so. Disobedience of access orders is "essentially civil contempt in character, and amenable to writs of attachment or commital pursuant to the civil rules." (at 332).

R. Andrews (1978), 4 R.F.L. (2d) 225 (B.C. Prov. Ct.). As in Rupert *infra*, the mother was charged under Section 116 (now 127) with disobeying an order for reasonable access. The court quashed the information, stating that the court's inherent power to punish for contempt is another mode of proceeding expressly provided by law.

R. V. Clement, [1981] 2 S.C.R. 468. While this case does not deal with access violations (the husband had breached a restraining order), it is relevant insofar as the Supreme Court of Canada made it clear that a person violating a court order in a family matter can be prosecuted for criminal contempt under Section 127 (then 116). Per Estey, J., at 479:

> In the result a charge can be laid under S. 116(1) in circumstances such as here exist where an order of the Court of Queen's Bench, civil in nature, may have been violated whether or not such violation or failure to comply could have given rise to other proceedings in other courts. I adopt, with respect, the statement by Huband J.A. below: "The authority to lay a charge under s. 116(1) is not preempted by the general jurisdiction of the superior court to deal with civil contempt."

R. V. Petropoulus *supra* where the court said the father was also clearly liable to prosecution under Section 127.

7. OTHER REMEDIES

(A). Compensatory Access

Yunyk v. Judd (1986), 5 R.F.L. (3d) 206 (Man Q.B. Fam. Div.). The terms of a consent order provided that the father had specified

access. The mother refused to comply with the order, claiming the child was upset after the visits, and the father initiated contempt proceedings. The mother ignored the motion and did not appear in court. She was found in contempt and to"compensate the child and the (father) from (sic) being deprived of one another's company by the (mother)", the court ordered additional specified access.

(B) Counselling:

Casement v. Casement, [1986] A.W.L.D. 1388, [1986] W.D.F.L. 1986, and (1987) 9 R.F.L. (3d) 169 (Alta Q.B.) (*supra* Section 3 Suspension of Support Payments) where court ordered: that a psychologist be appointed as counsellor for the access parent(father) and the children, that a fixed number of counselling sessions take place, that the mother deliver the children to the counsellor's office for the sessions, and that the matter be reviewed by the court in approximately six months time on the application of either party. Due to the children's hostility and lack of cooperation engendered by the mother, only one abortive counselling session with the children took place. When the matter returned to court in 1987, the court did not consider a change in custody or contempt to be feasible given the children's defiant refusal to see the father, and instead ordered that the father pay the fees of any access counselling any of the children would agree to , and ordered that until reasonable access was established with a child, maintenance was suspended for that child.

Harrison v. Harrison (1988), unreported decision of Helper, J. delivered June 29, Suit No. 85-01-00422, Man. Q.B. Fam Div. (See also earlier decision involving the same parties in Section 3, Suspension of Support Payments). The parties had been battling in court for the four years since their final separation over access to their two children in the custody of the mother. The children now did not want to see their father and were exhibiting disturbing behaviour. All of the five expert witnesses testified that the children ought to see their father and the court concluded that the mother's actions had been selfish, vindictive, and contrary to the well-being of the children. However, the court was unwilling to change custody to the father due to the disruption to the children, and the probable result of a further breakdown in the father-child relationship, and considered supervised access to be unworkable. The court ordered the mother to arrange for counselling for the children, the counsellor to be approved by the court and paid for by the mother. The counsellor was to provide a progress report to the court in six months time.

(C) Payment of Costs and Expenses:

Curtis v. Curtis (1990) 29 R.F.L. 235 (Ont. C.J. Gen. Div.). The mother had custody and the father reasonable access. The mother lived in Ontario, the father in Alberta. The parties had had difficulties with access since their separation four years previously and the father claimed the mother was responsible. In August, 1990, the mother told the father she was considering moving to Hawaii as a result of a job offer. The father then obtained a court order prohibiting the mother from removing the children from Ontario without the court's consent. Regardless of the court order and without consulting the father, the mother proceeded with her plans, but before she was able to leave, the father applied to the court for a change in custody. The court declined to order a change in custody as the father, for whatever reason, had seen the children very little since the separation. The court allowed the mother to take the children to Hawaii but only on certain conditions, including *inter alia*: (a) she had to pay for round trip airfare, as well as ground transportation, accommodation and food, for the father to visit the children in Hawaii, (b) she had to pay for half the costs of the children's travel to visit the father, (c) she had to send to the father and the court a written report on the children on a monthly basis, and (d) she had to file a written undertaking with the court that the court would continue to have sole jurisdiction respecting the children. In addition, the mother's interest in a Toronto residence was to be charged with the amount of $5000 to cover any amount owing to the father under the order, and any maintenance arrears owing were not to be dealt with until her return to Canada.

Staranowicz v. Staranowicz (1990), 30 R.F.L. 185 (Ont. C.J.[Gen. Div.]). By the terms of their divorce, the mother had custody of the two children and the father had access alternate weekends and other times on reasonable notice. The mother clandestinely moved with the children from Ontario to British Columbia and when the husband located them, the wife advised the children did not want to see him, despite an affectionate relationship prior to their removal. The father applied to the Ontario court for return of the children and custody. While the court said the mother's conduct was calculated to frustrate the father's access and could not be condoned, it declined to order return of the children, saying, at 189:

> If the subject matter in this application were other than the custody of two small children, the respondent could expect the harshest possible sanctions of her conduct by the Court. The Court, however, must put the interest of the

children ahead of its own feelings. It would not be in their best interest for them to be removed forcibly from the custody of their mother without a full hearing. For that reason only, the primary application must be dismissed.

However, the court ordered trial of the issue and an independent assessment, both to take place in Ontario. The mother was ordered to return with the children to Ontario at her expense for examinations for discovery, the assessment, and for a sufficiently long period of time for access to occur. The court also assessed solicitor/client costs against her.

(D) Security for Contribution to Access Parent's Costs:

Curtis v. Curtis *supra* where the court ordered a charge be placed against property owned by the custodial parent.

(E) Damages for Interference with Access:

Schrenk v. Schrenk (1981), 32 O.R. (2d) 122 (H.C.) The mother and the maternal grandparents had deliberately prevented the father from seeing his son for a number of years. The father had sought to have his access order enforced by the courts but the mother kept ignoring the orders. At the time of this application, the boy, who was five when the parties divorced, was seventeen and he refused to see his father so there was no point in continuing to try to enforce access. The father brought a tort action for deprivation of the ability to develop a relationship of love, society, and companionship with his child. The court said that his statement of claim disclosed no cause of action and there is no legal remedy for loss of opportunity to be a father or to develop a meaningful relationship with a child. The only remedies available were the traditional ones for breach of a court order. The court also said that even if there had been such a common law action, it was abolished by Section 69(4) of the Family Law Reform Act, 1978 (Ont.), c. 2 which abolished the common law actions for harbouring and enticement.

Frame v. Smith [1987] 2 S.C.R. 99 (S.C.C.) Upon separation, custody of the three children, then 8,4 and 2, was given to the mother with generous access to the father. Soon after the divorce the mother and her new husband began a campaign to deny access to the father which included moving to distant cities without notification; changing the children's surname and religion; intercepting letters; and forbidding telephone communication. The father repeatedly attempted to have his access rights enforced but to no avail. At the time of this application, the children were 24, 19 and 18 and the father had desisted in his attempts to enforce access because his relationship with them was

utterly destroyed. The father was making a claim for damages for his expenses in attempting to exercise access to his children as well as for the emotional and psychic distress which he suffered due to the mother and her husband's wrongful interference with the legal relationship which he had with his children. His statement of claim was struck out at trial because it disclosed no reasonable cause of action. His appeal to the Court of Appeal was dismissed. He appealed to the Supreme Court of Canada which also dismissed his appeal (Wilson J. dissenting).

The majority held that there was no common law right of access (as opposed to custody). Any existing right was statutory. La Forest J. for the majority held that there was no tort action at common law. The legislature had created a comprehensive scheme in the area of custody and access and it was not for the court to upset the balance by allowing a new cause of action.

Wilson J. in dissent would have recognized a cause of action for breach of fiduciary duty (although not a tort action) because:

(a) it would arise only in the circumstance of vulnerability caused by the splitting of custody and access (i.e. it couldn't be used in any other area of family law);
(b) it would create a strong incentive for the custodial parent to exercise custodial rights in the best interests of the child (i.e. by allowing access to the non-custodial parent);
(c) unlike causes of action in tort, breach of fiduciary duty allows the court to look at the conduct of the non-custodial parent (both as it relates to custody and access and otherwise) which might be contrary to the child's best interests because this is an equitable not a common law action.

Wilson J. said that the court has equitable jurisdiction to prevent the action from proceeding if it would harm the children. She said, at 145:

> I would hold, therefore, that the cause of action for breach of fiduciary duty can proceed only if there is no risk that the support of the children will be impaired and no risk of a harmful conflict of loyalties arising in the children. The former condition may be satisfied where the relationship between the non-custodial parent and the children has been so severely damaged by the custodial parent's conduct that it is unlikely that a conflict of loyalties would occur. Accordingly, it will not be every denial of access rights that will give rise to a cause of action for breach of fiduciary duty but only where a sustained course of conduct has caused severe damage to the non-custodial parent-child relationship to the detriment of both the non-custodial parent and the child.

8. CHILDREN'S REFUSAL TO VISIT

Singer v. Singer (1974), 17 R.F.L. 18 (Ont. H.C.) *supra* Section 4 Contempt where the court suggested the custodial parent might have to use physical force as a last resort, but did not consider it necessary in the circumstances of the case.

McCann v. McCann (1975), 18 R.F.L. 149 (N.S.C.A.) The three oldest children did not wish to see their father while the two younger ones said they would like to see him "sometimes" The father wanted access to all five children. The trial judge decided that children should not be forced to visit so no order was made as to access to the three older children and the two younger ones only had to go if they wanted to - no specified times for access were put in the order. The Court of Appeal upheld the trial judge.

Racette v. Racette (1976, 27 R.F.L. 299 Ont. H.C.) *supra* Section 4 Contempt where the judge stated he dod not think he could force a child of 14 and a half to see his parent.

Tassou v. Tassou (1977), 28 R.F.L. (3d) 171 (Alta. S.C.) *supra* Section 3 Suspension of Support Payments where the court suspended maintenance payments until access was resumed as the court believed the custodial parent had influenced the sons to refuse visits.

Washburn v. Washburn (1986), 177 A.P.R. 99 (N.B.Q.B. Fam. Div.). Pursuant to a separation agreement the 14 year old son resided with the father and the mother had generous access. The son told the mother he didn't want to see her and the mother had limited contact with him thereafter. The mother applied for custody or enforcement of access. The mother alleged the father had failed to assist in a positive way or encourage access. The father maintained he had tried to encourage visits but that at the boy's age, the decision was his. The court referred to principles set out in Christine Davies, **Family Law in Canada** (4th ed.) Carswell 1984, at 52, that: "courts will ordinarily not order access in respect of a child of 15 or 16 who is adamantly opposed to such access. This is because children of that age will simply make their own choice and the court canot supervise its orders with any degree of effectiveness," and "it has been said that there is a duty on the custodial parent to actively encourage access (as opposed to merely not preventing the access from taking place)." (At 544 and 545 in the Davies text.) The court declined to change custody but ordered the father to actively encourage the

son to see the mother. However, if the son did not wish to comply with the access, it would be suspended.

9. REMEDIES WHERE ACCESS PARENT NOT EXERCISING ACCESS

Russo v. Russo (1988), 15 R.F.L. (3d) 243 (Ont. S.C.) The custodial mother applied for increased child support. The father had generous access rights but he had refused to exercise them because he had remarried and lost interest in the child. As a result, the court found that the mother had acquired an increased financial burden because she was offered no relief from looking after the child. The court ordered that child support be increased to cover the mother's additional child care costs, as well as for other reasons.

10. MISCELLANEOUS

Masnyk v. Masnyk (1986), 3 R.F.L. (3d) 147 (Man. Q.B. Fam. Div.). The father obtained a provisional order in Alberta under the Reciprocal Enforcement of Maintenance Orders Act suspending maintenance until the mother, resident in Manitoba, gave him reasonable access. The order was transmitted to Manitoba for confirmation and the Manitoba court refused to confirm it because the judge was satisfied that the mother would give access if the father provided adequate notice. In *obiter*, the court also observed that it does not have the jurisdiction to deal with access under the Reciprocal Enforcement of Maintenance Orders Act.

APPENDIX B
CANADIAN ACCESS ENFORCEMENT LEGISLATION

MANITOBA

The Family Maintenance Act, R.S.M. 1987, c. F20

Orders under Child Custody Enforcement Act.
11 In an application for custody of or access to a child under this or any other Act, a judge may, if he considers it necessary in the circumstances, by order

(a) authorize the applicant or someone on his behalf to locate and apprehend a child and section 9 of The Child Custody Enforcement Act applies with the necessary changes to the order;

(b) direct any person or public body to provide the court with such particulars of the address of the proposed respondent to the application as are contained in the records in the custody of the person or body and Section 13 of The Child Custody Enforcement Act applies with the necessary changes to the order.

Either parent may apply for custody of child.
39(2) Either parent of a child may make an application

(a) for custody of the child; or

(b) for access to the person of the child;

and upon the hearing of the application the court may order that

(c) custody of the child be committed to the applicant or respondent or both;

(d) the non-custodial parent have access, at such times and subject to such conditions as the court deems convenient and just, for the purpose of visiting the child and fostering a healthy relationship between parent and child.

Access of parent to school and medical records.
39(4) Unless a court otherwise orders, the non-custodial parent retains the same right as the parent granted custody to receive school, medical, psychological, dental and other reports affecting the child.

Exception.
39(5) The right of the non-custodial parent to receive the records described in subsection (4) is a right to be provided with information only, and is not, unless a court orders otherwise, a right to be consulted about or to participate in the making of decisions by the parent granted custody.

Penalty.
50(1) A person who fails to comply with a provision of this Act or with a provision of an order or interim order made under this Act is guilty of an offence and is liable on summary conviction to a fine of not more than $500. or imprisonment for not more than six months or both.

Imposition of penalty.
50(2) Where a person is before a court for any purpose under this Act, other than under subsection(1), the court, if satisfied that the person has failed to comply with a provision of this Act or with a provision of an order or interim order made or enforced under this Act, may there and then by order impose any of the penalties provided in subsection(1).

The Child Custody Enforcement Act, R.S.M. 1987, c. C360

Definitions.
1 ..."custody order" means an order or that part of an order that grants custody of a child, or the effect of which is to grant custody of a child, to any person including provisions, if any, granting another person a right of access or visitation to the child;

Purposes.
2 The purposes of this Act are,...
(c) to provide for the more effective enforcement of custody orders...

Order to locate and take a child.
9(1) Where a court is satisfied upon application that there are reasonable and probable grounds for believing,
(a) that any person is unlawfully withholding a child from a a person entitled to custody of or access to the child;
(b) that a person who is prohibited by court order or separation agreement from removing a child from Manitoba proposes to remove the child or have the child removed from Manitoba; or
(c) that a person who is entitled to access to a child proposes to remove the child or to have the child removed from Manitoba and that the child is not likely to return,
the court may
(d) authorize the applicant or someone on his behalf to apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access, as the case may be; or

(e) direct a peace officer, a police force, or an agency or all three, having jurisdiction in any area where it appears to the court that the child may be, to locate, apprehend and deliver the child to the person named in the order; or
(f) do both (d) and (e).

Application without notice
9(2) An order may be made under subsection (1) upon an application without notice where the court is satisfied that it is necesary that action be taken without delay.

Duty to act.
9(3) A peace officer, police force or an agency directed to act by an order under subsection (1) shall do all things reasonably able to be done to locate, apprehend and deliver the child in accordance with the order.

Entry and search.
9(4) For the purpose of locating and apprehending a child in accordance with an order under subsection (1), a peace officer, a member of a police force or an authorized employees or agent of an agency may enter and search any place where he has reasonable and probable grounds for believing that the child may be with such assistance and such force as are reasonable in the circumstances.

Time.
9(5) An entry or search referred to in subsection (4) shall be made only between the hours of 8:00 a.m. and 8:00 p.m. unless the court, in the order, authorized entry and search at another time.

Expiration of order.
9(6) An order made under subsection (1) expires six months after the day on which it was made, unless the order specifically provides otherwise.

When application may be made.
9(7) An application under subsection (1) may be made in an application for custody or access under The Child and Family Services Act or The Family Maintenance Act or under this Act at any time.

Application to prevent removal of child.
10(1) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person prohibited by court order or separation agreement from removing a child from Manitoba proposes to remove the child from Manitoba, the court in order to prevent the removal of the child from Manitoba may make an order under subsection (3).

Application to ensure return of child.
10(2) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person entitled to access to a child proposes to remove the child from Manitoba and is not likely to return the child to Manitoba, the court in order to secure the prompt, safe return of the child to Manitoba may make an order under subsection (3).

Order by court.
10(3) An order mentioned in subsection (1) or (2) may require a person to do anyone or more of the following:

(a) Transfer specific property to a named trustee to be held subject to the terms and conditions specified in the order.
(b) Where payments have been ordered for the support of the child, make the payments to a specified trustee subject to the terms and conditions specified in the order.
(c) Post a bond, with or without sureties, payable to the applicant in such amount as the court considers appropriate.
(d) Deliver the person's passport, the child's passport and any other travel documents of either of them that the court may specify to the court or to an individual or body specified by the court.

Restriction of power of Provincial Court.
10(4) A judge of the Provincial Court (Family Division) shall not make an order under clause (3)(a).

Terms and conditions.
10(5) In an order under clause (3)(a), the court may specify terms and conditions for the return or the disposition of the property as the court considers appropriate.

Safekeeping.
10(6) A court or an individual or body specified by the court in an order under clause (3)(d) shalll hold a passport or travel document delivered in accordance with the order in safekeeping in accordance with any directions set out in the order.

Directions.
10(7) In an order under subsection (3), a court may give such directions in respect of the safekeeping of the property, payments, passports or travel documents as the court considers appropriate.

Information as to address.
13(1) Where, upon application to a court, it appears to the court that, for the purpose of enforcing a custody order, the

person in whose favour the order is made has need to learn or confirm the whereabouts of the person subject to the order, the court may order any person or public body to provide the court with such particulars of the address of the person subject to the order as are contained in the records in the custody of the person or body or within the knowledge of an individual, and the person, body or individual shall give the Court such particulars and the Court may then give the particulars to such person or persons as the Court considers appropriate.

Exception
13(2) A court shall not make an order on an application under subsection (1) where it appears to the court that the purpose of the application is to enable the applicant to identify or to obtain particulars as to the identity of a person who has custody of a child, rather than to learn or confirm the whereabouts of the person subject to a custody order so as to enforce the custody order.

Compliance with order.
13(3) The giving of information in accordance with an order under subsection (1) shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law rule of confidentiality.

Crown bound.
13(4) This section binds the Crown in right of Manitoba.

Contempt of court orders.
14(1) Every court may punish any contempt of or resistance to its process or orders in respect of custody or of access to a child by a fine of not more than $500. or imprisonment for not more than six months or both.

Conditions of imprisonment.
14(2) An order for imprisonment under subsection (1) may be made conditional upon default in the performance of a condition set out in the order and may provide for the imprisonment to be served intermittently.

Order where access wrongfully denied
14.1(1) Where a court, upon application, is satisfied that a person in whose favour an order has been made for access to a child at specific times or on specific days has been wrongfully denied access to the child by a person in whose favour an order has been made for custody of the child, the court may make one or both of the following orders, taking into account the best interests of the child:

(a) require the respondent to reimburse the applicant for any reasonable expenses actually incurred as a result of the wrongful denial of access;
(b) require supervision of the access where the court is satisfied that a person or agency is willing and able to provide proper supervision.

Order on failure to exercise access
14.1(2) Where the court, upon application, is satisfied that a person in whose favour an order has been made for access to a child at specific times or on specific days has wrongfully failed to exercise the right of access or to return the child as the order requires, the court may make one or both of the following orders, taking into account the best interests of the child:
(a) require the respondent to reimburse the applicant for any reasonable expenses actually incurred as a result of the failure to exercise the right of access or to return the child as the order requires;
(b) require supervision of the access where the court is satisfied that a person or agency is willing and able to provide proper supervision.

The Court of Queen's Bench Act, R.S.M. 1987, c.C280

Referral to mediator.
47(1) Where a judge or master is of the opinion that an effort should be made to resolve an issue otherwise than at a formal trial, the judge or master may, at any stage of the proceeding, refer the issue to a mediator.

Action by mediator.
47(2) A mediator to whom an issue is referred under subsection (1) shall attempt to resolve the issue.

Family evaluator
49(1) Where a judge or master is of the opinion that a report of a family evaluator is required at a hearing with respect to custody, access or a related family matter, the judge or master may by order appoint a family evaluator.

Duty of family evaluator
49(2) A family evaluator appointed under subsection (1) shall interview the parties and such other persons as may be appropriate and shall provide to the court a report containing information and opinion relevant to custody, access or a related family matter that is in issue in the proceeding.

ALBERTA

Provincial Court Act. R.S.A. 1980, c. P-20

32(8) Any person who contravenes a provision as to custody or right of access in an order made under this section is guilty of an offence and liable to a fine of not more than $1000 or to imprisonment for a term not exceeding 4 months or to both fine and imprisonment.

BRITISH COLUMBIA

Family Relations Act, R.S.B.C. 1979, c. 121

Family advocate
2(1) The Attorney General may appoint a person who is a member in good standing of the Law Society of British Columbia to be a family advocate.

2(2) A family advocate may, notwithstanding any other Act and subject to the law of Canada, attend a proceeding under this Act or respecting the

(a) adoption of a child;
(b) guardianship of a child, guardianship of the person of a child or guardinship of the estate of a child;
(c) custody of, maintenance for or access to a child;
(d) alleged commission by a child of a Provincial or federal offence; or
(e) *Family and Child Service Act*

and intervene at any stage in the proceeding to act as counsel for the interests and welfare of the child.

Expert witness provisions respecting family matters.
15(1) In a proceeding under this Act, the court may, on application, including *ex parte* application, direct an investigation into a family matter by a person who

(a) has had no previous connection with the parties to the proceeding or to whom each party consents; and
(b) is a family counsellor, social worker, probation officer or other person approved by the court for the purpose.

15(2) A person directed to carry out an investigation under subsection (1) shall report, in the manner which the court may direct, the results of the investigation.

15(3) No person shall report to a court the result of an investigation under subsection (1) unless, not less than 30 days before the report is to be given to the court, he serves a copy of the report on every party to the proceeding.

15(4) Where satisfied that circumstances warrant, the court may grant an exemption from subsection (3).

Part 2 - Child Custody, Access and Guardianship

Order prohibiting interference with a child.

37(1) Where a court makes a custody order or a custody order or separation agreement is enforceable by a court, the court may order that a person

(a) shall not enter premises, including premises the person owns or has a right to possession of, where the child resides from time to time;

(b) shall not make contact or endeavour to make contact with or otherwise interfere with either the child or any person having custody of or access to the child; or

(c) where a court concludes that the person named in its custody order may not comply with an order under paragraph (a) or (b), the court may further order that the person

(i) enter into a recognizance, with or without sureties, in such reasonable amount as the court thinks necessary;

(ii) report to the court or person designated for the period of time, and at the times and places, as the court considers necessary and reasonable;

(iii) deliver up to the court, or a person designated by the court, such documents as the court thinks fit; or

(iv) transfer specific property to a trustee named by the court to be held subject to the terms and conditions specified in the order

or any combination of these.

37(2) The Provincial Court shall not make an order under subsection (1) (c) (iv).

37(3) In an order under subsection (1) (c) (iv), the court may specify terms and conditions for the return or the disposition of the property as the court considers appropriate.

37(4) A court, or a person designated by the court in an order under subsection (1) (c) (iii), shall hold documents delivered in accordance with the order in safekeeping in accordance with any directions set out in the order.

37(5) In an order under subsection (1), a court may give any directions it considers appropriate in respect of the safekeeping of the documents or property.

Access to information.

37.1(1) An enforcement officer designated under section 63.1 may, for the purposes of assisting a person

(a) to bring an application respecting custody of or access to a child or respecting guardianship of a child or of the person of a child, or

(b) to enforce an order respecting custody of or access to a child or respecting guardianship of a child or of the person of a child,

demand from any person or public body, including the Crown, information that is in a record in the possession or control of that person or public body and that concerns the address or location of the proposed respondent to the application referred to in paragraph (a) or of the person having actual custody of the child in respect of whom the order referred to in paragraph (b) is made.

37.1(2) Subsection (1) does not apply in respect of

(a) a personal correspondence between the person respecting whom the information is sought and a parent, child, spouse, brother or sister of that person,

(b) information in the possession or control of

(i) a solicitor of the person respecting whom the information is sought, or

(ii) a family court counsellor, or

(c) information the disclosure of which is forbidden by section 9(1)(b) of the *Statistics Act*.

37.1(3) Notwithstanding any other enactment or any common law rule of privilege or confidentiality, any person or public body, including the Crown, that receives a demand under subsection (1) shall provide any of the demanded information that is in any record in the possession or control of the person or public body.

37.1(4) The enforcement officer may disclose information provided under subsection (3) to a person performing in a reciprocating state functions similar to those of the enforcement officer.

37.2(1) Where, on application, the court is satisfied that

(a) an enforcement officer has been refused information after making a demand under section 37.1(1), or

(b) a person needs an order under this section to bring an application referred to in section 37.1(1)(a) or to enforce an order referred to in section 37.1(1)(b).

the court may, notwithstanding any other enactment or any common law rule of privilege or confidentiality, order any person or public body, including the Crown, to provide to the applicant or to an individual named by the court, any information that is in the possession or control of that person or public body and that concerns the address or location of the proposed respondent to the application referred to in section 37.1(1)(a) or of the person having actual custody of the child in respect of whom the order referred to in section 37.1(1)(b) is made.

37.2(2) The court shall not make an order under subsection (1)
(a) against a solicitor of the person respecting whom the information is sought or against a family court counsellor, or
(b) where it appears to the court that the purpose of the application under this section is to enable the applicant to identify or to obtain information as to the identity of a person who has custody of a child, rather than to learn or confirm the whereabouts of the proposed respondent to an application referred to in section 37.1(1)(a) or to facilitate the enforcement of an order referred to in section 37.1(1)(b).

Confidentiality.
37.3 No person shall disclose information provided under section 37.1 or 37.2 except
(a) to the extent necessary for the purpose of
(i) bringing an applicaiton referred to in section 37.1(1)(a) or
(ii) enforcing an order referred to in section 37.1(1)(b), or
(b) as provided in section 37.1(4).

81(2) A person who, without lawful excuse, interferes with the custody of, or access to, a child in respect of whom an order for custody or access was made or is enforceable under this Act commits an offence.

NEW BRUNSWICK

Family Services Act, S.N.B. 1980, c. F-2.2

8 In any proceeding under this Act that affects a child, the court may, where it determines that it would be in the best interests of the child to do so, require that the child, a parent or any other person living with the child or in such a close relationship with the child as to be in a position to influence the nature of the care and control exercised with respect to the child, undergo a psychiatric, psychological, social, physical or any other examination or evaluation specified by the court, prior to or during the hearing, and in the event of the refusal or failure by any person to participate in an examination or evaluation, or to consent to the examination or evaluation of a child under his care, the court may draw such inferences as appear to the court to be warranted under the circumstances.

122(1) Where it appears to a court that,

(a) for the purpose of bringing an application under this Part; or

(b) for the purpose of the enforcement of an order for support, custody or access,

the proposed applicant or person in whose favour the order is made has need to learn or confirm the whereabouts of the proposed respondent or person against whom the order is made, the court may order any person or public agency to provide the court with the address that is contained in the records in its custody and the person or agency shall provide to the court such particulars as it is able to provide.

122(1.1) A court shall not make an order on an application under subsection (1) where it appears to the court that the purpose of the application is to enable the applicant to identify or to obtain particulars as to the identity of a person who has custody of a child, rather than to learn or confirm the whereabouts of the proposed respondent or to enforce an order for support, custody or access.

122(1.2) The giving of information in accordance with an order under subsection (1) shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law rule of confidentiality.

122(2) This section binds the Crown in right of the Province.

130.7(1) In addition to his powers in respect of contempt, every judge of the Provincial Court may punish by fine or imprisonment,

or both, any wilful contempt of or resistance to the process or orders of the Court in respect of custody of or access to a child, but the fine shall not in any case exceed one thousand dollars nor shall the imprisonment exceed ninety days.

130.7(2) An order for imprisonment under subsection (1) may be made conditional upon default in the performance of a condition set out in the order any may provide for the imprisonment to be served intermittently.

131 In any custody proceeding, whether or not brought under this Part, or in any other proceeding brought under this Part, if the court is of the opinion that any question arising might reasonably be the subject of conciliation, and that it would be in the best interests of the family to attempt to resolve the question through conciliation, the court may make an order requiring the Minister to make conciliation services available to the parties and may adjourn the proceeding for a reasonable time.

132(1) Where a court makes a custody order or a custody order is enforceable under this Part, the court may order that a person

(a) shall not enter premises, including premises the person owns or has a right to possession of, where the child resides from time to time, or

(b) shall not make contact or endeavour to make contact with or otherwise interfere with either the child or any person having custody of or access to the child.

132(2) Where a court is of the belief that the person named in an order under paragraph (1)(a) or (b) may not comply therewith the court may further order that the person comply with any or all of the following directions, namely

(a) enter into a recognizance, with or without sureties, in such reasonable amount as the court considers necessary,

(b) report to the court or person designated for such period of time, and at such times and places, as the court considers necessary and reasonable,

(c) deliver up to the court such documents as the court considers fit.

132.1(1) Where a court is satisfied upon application by a person in whose favour an order has been made for custody of or access to a child that there are reasonable and probable grounds for believing that any person is unlawfully withholding the child from the applicant, the court by order may authorize the applicant or someone on his behalf to apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access, as the case may be.

132.1(2) Where a court is satisfied upon application that there are reasonable and probable grounds for believing

(a) that any person is unlawfully withholding a child from a person entitled to custody of or access to the child,

(b) that a person who is prohibited by court order or separation agreement from removing a child from the Province proposes to remove the child or have the child removed from the Province, or

(c) that a person who is entitled to access to a child proposes to remove the child or to have the child removed from the Province and that the child is not likely to return,

the court by order may direct any or all police officers having jurisdiction in an area where it appears to the court that the child may be, to locate, take charge of and deliver the child to the person named in the order.

132.1(3) An order may be made under subsection (1) or (2) upon an application without notice where the court is satisfied that it is necessary that action be taken without delay.

132.1(4) Any police officer directed to act by an order under subsection (2) shall do all things reasonably able to be done to locate, take charge of and deliver the child in accordance with the order.

132.1(5) For the purpose of locating and taking charge of a child in accordance with an order under subsection (2), a police officer may enter and search any place where he has reasonable grounds for believing that the child may be with such assistance and such force as are reasonable in the circumstances.

132.1(6) An order made under subsection (2) expires six months after the day on which it was made, unless the order specifically provides otherwise.

132.1(7) An application under subsection (1) or (2) may be made in an application for custody or access or at any other time.

132.2(1) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person prohibited by court order or separation agreement from removing a child from the Province proposes to remove the child from the Province, the court in order to prevent the removal of the child from the Province may make an order referred to in subsection (3).

132.2(2) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person entitled to

access to a child proposes to remove the child from the Province and is not likely to return the child from the Province, the court in order to secure the prompt, safe return of the child to the Province may make an order referred to in subsection (3)

132.2(3) An order mentioned in subsection (1) or (2) may require a person to do any one or more of the following:

(a) transfer specific property to a named trustee to be held subject to the terms and conditions specifed in the order;
(b) where payments have been ordered for the support of the child, make the payments to a specified trustee subject to the terms and conditions specified in the order;
(c) post a bond, with or without sureties, payable to the applicant in such amount as the court considers appropriate;
(d) deliver the person's passport, the child's passport and any other travel documents of either of them that the court may specify to the court or to an individual or body specified by the court.

132.2(4) A judge of the Provincial Court shall not make an order referred to in paragraph (3)(a).

132.2(5) In an order referred to in paragraph (3)(a), the court may specify terms and conditions for the return or the disposition of the property as the court considers appropriate.

132.2(6) A court or an individual or body specified by the court in an order referred to in paragraph (3)(d) shall hold a passport or travel document delivered in accordance with the order in safekeeping in accordance with any directions set out in the order.

132.2(7) In an order referred to in subsection (3), a court may give such directions in respect of the safekeeping of the property, payments, passports or travel documents as the court considers appropriate.

NEWFOUNDLAND

The Children's Law Act, S. Nfld. 1988, c. 61, as amended.

Part III Custody and Access.

25 The purposes of this Part are...
(d) to provide for the more effective enforcement of custody and access orders...

26(5) Where the parents of a child live separate and apart and the child is in the custody of one of them and the other is entitled to access under the terms of a separation agreement or order, each shall, in the best interests of the child, encourage and support the child's continuing relationship with the other.

26(6) The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

34(1) Where an order for access to a child provides for access without specifying times or days, a party to the order may apply to a court to vary the order by specifying times or days.

34(2) The court may vary the order by specifying times or days agreed on by the parties or where the parties do not agree the court may vary the order as it sees fit.

Order varying an order.
35(1) A court shall not make an order under this Part that varies an order in respect of custdoy or access made by a court in the province unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child.

35(2) Subsection (1) does not apply to an order made under subsection (2) of section 34 or subsection (2) or (6) of section 41.

Assessment of needs of child.
36(1) The court before which an application is brought in respect of custody of or access to a child, by order, may appoint a person who has technical or professional skill to investigate, assess and report to the court on the needs of the child and the ability and willingness of the parties to satisfy the needs of the child.

36(2) A order may be made under subsection (1) on or before the hearing of the application in respect of custody of or access to

the child and with or without a request by a party to the application.

36(3) The court shall, if possible, appoint a person agreed upon by the parties, but if the parties do not agree the court shall choose and appoint an independent person.

36(4) The court shall not appoint a person under this section unless the person has consented to make the assessment and to report to the court within the period of time specified by the court.

36(5) In an order under subsection (1), the court may require the parties, the child and any other person who has been given notice of the proposed order, or any of them, to attend for assessment by the person appointed by the order.

36(6) Where a person ordered under this section to attend for assessment refuses to attend or to undergo the assessment, the court may draw those inferences in respect of the ability and willingness of a person to satisfy the needs of the child that the court considers appropriate.

36(7) The person appointed under subsection (1) shall file his or her report with the clerk or registrar of the court.

36(8) The clerk or registrar of the court shall give a copy of the report to each of the parties and to counsel, if any, representing the child.

36(9) The report mentioned in subsection (7) is admissible in evidence in the application.

36(10) The parties, and counsel, if any, representing the child, may require the person appointed under subsection (1) to attend as a witness at the hearing of the application.

36(11) Upon motion, the court by order may give those directions in respect of the assessment that the court considers appropriate.

36(12) The court shall require the parties to pay the fees and expenses of the person appointed under subsection (1) except where that person is engaged or employed by the court or otherwise by the Crown.

36(13) The court shall specify in the order the proportions or amounts of the fees and expenses that the court requires each party to pay.

36(14) The court may require one party to pay all the fees and expenses of the person appointed under subsection (1) where the court is satisfied that payment would cause the other party serious financial hardship.

36(15) The appointment of a person under subsection (1) does not prevent the parties or counsel representing the child from submitting other expert evidence as to the needs of the child and the ability and willingness of the parties to satisfy the needs of the child.

Mediation.
37(1) Upon an application for custody of or access to a child, the court, at the request of the parties, by order may appoint a person selected by the parties to mediate a matter specified in the order.

37(2) The court shall appoint only a person who
(a) has consented to act as mediator; and
(b) has agreed to file a report with the court within the period of time specified by the court.

37(3) It is the duty of a mediator to confer with the parties, and with the children if the mediator considers it appropriate to do so, and shall try to obtain an agreement in respect of the matter.

37(4) Before entering into mediation on the matter, the parties shall agree whether
(a) the mediator is to file a full report on the mediation, including anything that the mediator considers relevant to the matter in mediation; or
(b) the mediator is to file a limited report that either sets out the agreement reached by the parties or states only that the parties did not reach agreement on the matter.

37(5) The mediator shall file a report with the clerk or registrar of the court in the form agreed upon by the parties under subsection (4).

37(6) The clerk or registrar of the court shall give a copy of the report to each of the parties and to counsel, if any, representing the child.

37(7) Where the parties have decided that the mediator is to file a limited report, evidence arising from anything said, evidence of anything said or of an admission or communication made

in the course of the mediation is not admissible in a proceeding except with the consent of all parties to the proceeding in which the order was made under subsection (1).

37(8) The court shall require the parties to pay the fees and expenses of the person appointed under subsection (1) except where that person is on the staff of the court.

37(9) The court shall specify in the order the proportions of the fees and expenses that the court requires each party to pay.

37(10) The court may require a party to pay all the fees and expenses of the mediator where the court is satisfied that payment would cause the other party serious financial hardship.

Enforcement

40(1) Where an order is made for custody of or access to a child, a court may give the directions that it considers appropriate for the supervision of the custody or access by a person or the Director of Child Welfare.

40(2) A court shall not direct a person or the Director of Child Welfare to supervise custody or access as mentioned in subsection (1) unless the person or Director has consented to act as supervisor.

40(3) The Director of Child Welfare may designate a social worker to carry out the directions of the court in subsection (1) where the Director consents to act as a supervisor.

41(1) Where a person, in whose favour an order has been made for access to a child at specific times or on specific days, has been wrongfully denied access to the child by the person who has custdoy the person with access may apply for relief to the court that made the original access order.

41(2) Where the court is satisfied that access is being wrongfully denied to the applicant, the court may order

(a) the respondent to give the applicant compensatory access to the child for a period agreed on by the parties, or where the parties do not agree for a period that the court considers appropriate;
(b) supervision under section 40;
(c) the respondent to reimburse the applicant for reasonable expenses actually incurred as a result of the wrongful denial of access; or
(d) the appointment of a mediator in accordance with section 37.

41(3) Compensatory access shall not be longer than the access that was wrongfully denied.

41(4) A denial of access is not wrongful where

(a) the respondent believes on reasonable grounds that the child will suffer physical or emotional harm if access is exercised;

(b) the respondent believes on reasonable grounds that he or she might suffer physical harm if access is exercised;

(c) the respondent believes on reasonable grounds that the applicant is impaired by alcohol or a drug at the time of access;

(d) the applicant fails to present himseelf or herself to exercise the right of access within one hour of the time specified in the order or a time otherwise agreed on by the parties;

(e) the respondent believes on reasonable grounds that the child is suffering from an illness of such a nature that it is not appropriate to allow access to be exercised;

(f) the applicant does not satisfy written conditions that were agreed on by the parties or that are part of the order for access;

(g) on numerous occasions during the preceding twelve months the applicant had, without reasonable notice and excuse failed to exercise the right of access;

(h) the applicant had informed the respondent that he or she would not seek to exercise the right of access on the occasion in question; or

(i) the court thinks that the withholding of the access is, in the circumstances, justified.

41(5) Where the person who under the terms of an order has access to a child and has without reasonable notice and excuse, failed to exercise the right to access or has not returned the child as the order requires, the person who has custody may apply for relief to the court that made the order for access.

41(6) Where the court is satisfied that the respondent without reasonable notice and excuse, failed to exercise the right to access or did not return the child as the order requires, the court may order

(a) supervision under section 40;

(b) the respondent to reimburse the applicant for reasonable expenses actually incurred as a result of the failure to exercise the right to access or to return the child as the order requires; and

(c) the appointment of a mediator in accordance with section 37.

41(7) An application under subsection (1) or (5) shall be heard within ten days after it has been served.

41(8) An application under subsection (1) or (5) shall not be made more than thirty days after the alleged wrongful denial or failure.

41(9) The application shall be determined on the basis of oral evidence only, unless the court gives leave to file an affidavit.

41(10) At the hearing of the application, unless the court orders otherwise, evidence shall be admitted only if it is directly related to

(a) the alleged wrongful denial of access or failure to exercise the right of access or failure to return the child as the order requires; or

(b) the respondent's reasons for the denial of access or failure to exercise access or return the child.

41(11) A person who is a party to a separation agreement made under section 64 of *The Family Law Act* may file the agreement with the Trial Division or the Unified Family Court, together with the person's affidavit stating that the agreement is in effect and has not been set aside or varied.

41(12) When a separation agreement providing for access to a child at specific times or on specific days is filed in accordance with subsection (11), subsections (1) or (5) apply as if the agreement were an order of the court where it is filed.

41(13) Where the court is satisfied that a person has made a motion under subsection (1) or (5) in bad faith, the court shall only hear further applications by that person under this section by leave of the court.

41(14) Subsections (1) and (5) do not apply in respect of orders made under the *the Divorce Act, 1985* (Canada) or a predecessor of that Act.

41(15) This section does not apply in respect of a denial of access or a failure to exercise a right of access or to return a child as the order or agreement requires that took place before this section comes into force.

Order where child unlawfully withheld.

43(1) Where a court is satisfied upon application by a person in whose favour an order has been made for custody of or access to a child that there are reasonable and probable grounds for believing that a person is unlawfully withholding the child from

the applicant, the court by order may authorize the applicant or someone on the applicant's behalf to apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access, as the case may be.

43(2) Where a court is satisfied upon application that there are reasonable and probable gounds for believing,

(a) that a person is unlawfully withholding a child from a person entitled to custody of or access to the child;

(b) that a person who is prohibited by court order or separation agreement from removing a child from the province proposes to remove the child or have the child removed from the province; or

(c) that a person who is entitled to access to a child proposes to remove the child or to have the child removed from the province and that the child is not likely to return,

the court by order may direct a peace officer having jurisdiction in an area where it appears to the court that the child may be, to locate, apprehend and deliver the child to the person named in the order.

43(3) An order may be made under subsection (2) upon an application without notice where the court is satisfied that it is necessary that action be taken without delay.

43(4) The peace officer directed to act by an order under subsection (2) shall do all things reasonably able to be done to locate, apprehend and deliver the child in accordance with the order.

43(5) For the purpose of locating and apprehending a child in accordance with an order under subsection (2), a peace officer may enter and search a place where he or she has reasonable and probable grounds for believing that the child may be with the assistance and the force that are reasonable in the circumstances.

43(6) Where a social worker of the Department of Social Services is available a peace officer may ask for his or her assistance to carry out an order under subsection (2)

43(7) An entry or a search referred to in subsection (5) shall be made only between 6 a.m. and 9 p.m. unless the court, in the order, authorizes entry and search at another time.

43(8) An order made under subsection (2) shall name a date on which it expires, which shall be a date not later than six months after it is made unless the court is satisfied that a longer period of time is necessary in the circumstances.

43(9) An application under subsection (1) or (2) may be made in an application for custody or access or at another time.

Enforcement Proceeding.
43.1 Where a child is the subject of an enforcement proceeding respecting custody or access under section 53* or the subject of a proceeding under section 282 or 283 of the *Criminal Code*, a social worker employed with the Department of Social Services may take custody of the child for the purpose of facilitating his or her return to the person who has lawful custody of the child. (*Section 53 relates to the Hague Convention).

44(1) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person prohibited by court order or separation agreement from removing a child from the province proposes to remove the child from the province, the court in order to prevent the removal of the child from the province may make an order under subsection (3).

44(2) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person entitled to access to a child proposes to remove the child from the province and is not likely to return the child to the province, the court in order to secure the prompt, safe return of the child to the province may make an order under subsection (3).

44(3) An order mentioned in subsection (1) or (2) may require a person to do one or more of the following:

(a) transfer specific property to a named trustee to be held subject to the terms and conditions specified in the order;
(b) where payments have been ordered for the support of the child, make the payments to a specified trustee subject to the terms and conditions specified in the order;
(c) post a bond, with or without sureties, payable to the applicant in the amount that the court considers appropriate;
(d) deliver the person's passport, the child's passport and other travel documents of either of them that the court may specify to the court or to an individual or body specified by the court.

44(4) A Provincial Court judge shall not make an order under paragraph (a) of subsection (3).

44(5) In an order under paragraph (a) of subsection (3), the court may specify terms and conditions for the return or the disposition of the property as the court considers appropriate.

44(6) A court or person or body specified by the court in an order under paragraph (d) of subsection (3) shall hold a passport or travel document delivered in accordance with the order in safekeeping in accordance with the directions set out in the order.

44(7) In an order under subsection (3), a court may give the directions in respect of the safekeeping of the property, payments, passports or travel documents that the court considers appropriate.

Contempt of orders of Provincial Court

45(1) In addition to its powers in respect of contempt, a Provincial Court judge may punish by fine or imprisonment, or both, a wilful breach of or resistance to its orders or process in respect of or resistance to its process or orders in respect of custody of or access to a child, but the fine shall not exceed one thousand dollars nor shall the imprisonment exceed ninety days.

45(2) An order for imprisonment under subsection (1) may be made conditional upon default in the performance of a condition set out in the order and may provide for the imprisonment to be served intermittently.

Information as to address.

46(1) Where, upon application to a court, it appears to the court that,

(a) for the purpose of bringing an application in respect of custody or access under this Part; or

(b) for the purposes of the enforcement of an order for custody or access,

the proposed applicant or person in whose favour the order is made has need to learn or confirm the whereabouts of the proposed respondent or person against whom the order referred to in paragraph (b) is made, the court may order a person or public body to provide the court with the particulars of the address of the proposed respondent or person against whom the order referred to in paragraph (b) is made as are contained in the records in the custody of the person or body, and the person or body shall give the court the particulars that are contained in the records and the court may then give the particulars to the person that the court considers appropriate.

46(2) A court shall not make an order on an application under subsection (1) where it appears to the court that the purpose of the application is to enable the applicant to identify or to obtain particulars as to the identity of a person who has custody

of a child, rather than to learn or confirm the whereabouts of the proposed respondent for the enforcement of an order for custody or access.

46(3) The giving of information in accordance with an order under subsection (1) shall be considered for all purposes not to be a contravention of an Act or regulation or a common law rule of confidentiality.

46(4) Notwithstanding another Act or law restricting the disclosure of information, a person or public body, including the Crown, that receives a demand under subsection (1) shall provide the demanded information that is contained in its records.

The Unified Family Court Act, S. Nfld. 1977, c.88 as amended

Court may order investigation.

16(1) Upon *ex parte* application, the court may direct a person who

(a) has had no previous connection with the parties to the proceeding, and

(b) is a family counsellor, social worker, probation officer, or other person approved by the court for the purpose,

to make a report on a party to the family matter or any other person who, in the opinion of the court, is associated with the family matter.

16(2) A person directed to make a report under subsection (1) shall, in such manner as the court may direct, present the report.

16(3) No person shall present to a court the report made under subsection (1) unless, not less than twenty-four hours before the report is to be presented, he serves a copy of the report upon every party to the proceeding.

NOVA SCOTIA

Family Maintenance Act, R.S.N.S., 1989, c.160

Report
19 At the hearing of an application under Section 18* or an application to vary or rescind an order respecting care and custody or access and visiting privileges, a court may request the Minister to cause a written report to be made to the court respecting the child and his parents or guardian. (*Section 18 relates to applications for custody and access).

Failure to comply with order.
41 Where it is made to appear under oath that a person has failed to comply with an order pursuant to this Act, the court may require the person to appear to explain the failure to comply. 1980, c. 6, s. 38.

Remedy upon non-compliance.
42(1) Notwithstanding the provisions of any general or special Act, where a person fails to comply with the conditions of an order made by a court of competent jurisdiction and fails to satisfy the judge that he has a reasonable excuse for such failure or default, the judge may

(a) issue an execution order following the procedure and form for an execution order provided in the rules of the Family Court;
(aa) enter a judgment for the outstanding amount as provided in the rules of the Family Court:
(b) issue a warrant for imprisonment of such person for such time not to exceed three months as the judge thinks fit unless, where the order is for the payment of a sum or sums of money, such sum or sums and the costs and charges attending the commitment and of conveying such person to jail are sooner paid.

Access to Public Record of Address.
51(1) Where it appears to a court that, for the purpose of

(a) a proceeding pursuant to this Act; or
(b) the enforcement of an order for maintenance, custody or access,

the proposed applicant or person in whose favour the order is made has need to learn or confirm the whereabouts of the proposed respondent or person against whom the order is made, the court may order any person or public agency to provide the court with particulars of the address contained in records in its custody and the person or agency shall provide to the court whatever particulars it is able to provide.

Section Binds Crown.
51(2) This Section binds Her Majesty the Queen in the right of the Province.

No action lies.
51(3) No action lies against a person who gave information in accordance with subsection (1).

Family Orders Information Release Act, R.S.N.S. 1989, c. 161

Interpretation.
3 In this Act,
(a) "access right" means a right respecting access or visitation of a child;
(b) "custody order" means an order awarding custody of a child;
(c) "family Order" means a support order, a custody order or an order granting an access right and includes an order or judgment, or any interim order or judgment, relating to family support, custody or access that is enforceable in the Province or another province;...

To whom information may be released.
5 Subject to the regulations, the Minister may release information or authorize its release to
(a) a person, service, agency or body
(i) entitled to have a family order enforced, or
(ii) authorized by the Minister to assist with the enforcement of a family order; or
(b) a peace officer investigating a child abduction.

Information which may be released.
6 Notwithstanding any general or special Act, the information that may be released pursuant to this Act is
(a) the address of the person who
(i) is in arrears under a support order,
(ii) is believed to have possession of a child contrary to a custody order or an order granting an access right,
(iii) is believed to have possession of a child who is the object of an investigation of child abduction;
(b) the address of a child referred to in this Section;
(c) the name and address of the employer of a child or other person referred to in this Section.

ONTARIO

Children's Law Reform Act, R.S.O. 1980, c. 68

Part III
Custody, Access and Guardianship

Purposes.
19 The purposes of this Part are...
(d) to provide for the more effective enforcement of custody and access orders...

Access.
20(5) The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

Custody and Access - Assistance to court

Assessment of needs of child.
30(1) The court before which an application is brought in respect of custody of or access to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

When order may be made.
30(2) An order may be made under subsection (1) on or before the hearing of the application in respect of custody of or access to the child and with or without a request by a party to the application.

Agreement by parties.
30(3) The court shall, if possible, appoint a person agreed upon by the parties, but if the parties do not agree the court shall choose and appoint the person.

Consent to act.
30(4) The court shall not appoint a person under subsection (1) unless the person has consented to make the assessment and to report to the court within the period of time specified by the court.

Attendance for assessment.
30(5) In an order under subsection (1), the court may require the parties, the child and any other person who has been given

notice of the proposed order, or any of them, to attend for assessment by the person appointed by the order.

Refusal to attend.
30(6) Where a person ordered under this section to attend for assessment refuses to attend or to undergo the assessment, the court may draw such inferences in respect of the ability and willingness of any person to satisfy the needs of the child as the court considers appropriate.

Report.
30(7) The person appointed under subsection (1) shall file his report with the clerk or registrar of the court.

Copies of report.
30(8) The clerk or registrar of the court shall give a copy of the report to each of the parties and to counsel, if any, represent the child.

Admissibility of report.
30(9) The report mentioned in subsection (7) is admissible in evidence in the application.

Assessor may be witness.
30(10) Any of the parties, and counsel, if any, representing the child, may require the person appointed under subsection (1) to attend as a witness at the hearing of the application.

Directions.
30(11) Upon motion, the court by order may give such directions in respect of the assessment as the court considers appropriate.

Fees and expenses.
30(12) The court shall require the parties to pay the fees and expenses of the person appointed under subsection (1).

Idem, proportions or amounts.
30(13) The court shall specify in the order the proportions or amounts of the fees and expenses that the court requires each party to pay.

Idem, serious financial hardship.
30(14) The court may relieve a party from responsibility for payment of any of the fees and expenses of the person appointed under subsection (1) where the court is satisfied that payment would cause serious financial hardship to the party.

Other expert evidence.

30(15) The appointment of a person under subsection (1) does not prevent the parties or counsel representing the child from submitting other expert evidence as to the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

Mediation.
31(1) Upon an application for custody of or access to a child, the court, at the request of the parties, by order may appoint a person selected by the parties to mediate any matter specified in the order.

Consent to act.
31(2) The court shall not appoint a person under subsection (1) unless the person,

(a) has consented to act as mediator; and
(b) has agreed to file a report with the court within the period of time specified by the court.

Duty of mediator.
31(3) It is the duty of a mediator to confer with the parties and endeavour to obtain an agreement in respect of the matter.

Form of report.
31(4) Before entering into mediation on the matter, the parties shall decide whether,

(a) the mediator is to file a full report on the mediation, including anything that the mediator considers relevant to the matter in mediation; or
(b) the mediator is to file a report that either sets out the agreement reached by the parties or states only that the parties did not reach agreement on the matter.

Filing of report.
31(5) The mediator shall file his report with the clerk or registrar of the court in the form decided upon by the parties under subsection (4).

Copies of report.
31(6) The clerk or registrar of the court shall give a copy of the report to each of the parties and to counsel, if any, representing the child.

Admissions made in the course of mediation.
31(7) Where the parties have decided that the mediator's report is to be in the form described in clause (4)(b), evidence of anything said or of any admission or communication made in the course of the mediation is not admissible in any proceeding

except with the consent of all parties to the proceeding in which the order was made under subsection (1).

Fees and expenses.
31(8) The court shall require the parties to pay the fees and expenses of the mediator.

Idem, proportions or amounts.
31(9) The court shall specify in the order the proportions or amounts of the fees and expenses that the court requires each party to pay.

Idem, serious financial hardship.
31(10) The court may relieve a party from responsibility for payment of any of the fees and expenses of the mediator where the court is satisfied that payment would cause serious financial hardship to the party.

Custody and Access - Enforcement

Supervision of custody or access.
35(1) Where an order is made for custody of or access to a child, a court may give such directions as it considers appropriate for the supervision of the custody or access by a person, a children's aid society or other body.

Consent to act.
35(2) A court shall not direct a person, a children's aid society or other body to supervise custody or access as mentioned in subsection (1) unless the person, society or body has consented to act as supervisor.

Orders where child unlawfully withheld.
37(1) Where a court is satisfied upon application by a person in whose favour an order has been made for custody of or access to a child that there are reasonable and probable grounds for believing that any person is unlawfully withholding the child from the applicant, the court by order may authorize the applicant or someone on his behalf to apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access, as the case may be.

Order to locate and take child.
37(2) Where a court is satisfied upon application that there are reasonable and probable grounds for believing,

(a) that any person is unlawfully withholding a child from a person entitled to custody of or access to the child;

(b) that a person who is prohibited by court order or separation agreement from removing a child from Ontario proposes to remove the child or have the child removed from Ontario; or

(c) that a person who is entitled to access to a child proposes to remove the child or to have the child removed from Ontario and that the child is not likely to return,

the court by order may direct the sheriff or a police force, or both, having jurisdiction in any area where it appears to the court that the child may be, to locate, apprehend and deliver the child to the person named in the order.

Application without notice.
37(3) An order may be made under subsection (2) upon an application without notice where the court is satisfied that it is necessary that action by taken without delay.

Duty to act.
37(4) The sheriff or police force directed to act by an order under subsection (2) shall do all things reasonably able to be done to locate, apprehend and deliver the child in accordance with the order.

Entry and search.
37(5) For the purpose of locating and apprehending a child in accordance with an order under subsection (2), a sheriff or a member of a police force may enter and search any place where he has reasonable and probable grounds for believing that the child may be with such assistance and such force as are reasonable in the circumstances.

Time.
37(6) An entry or a search referred to in subsection (5) shall be made only between 6 a.m. and 9 p.m. standard time unless the court, in the order, authorizes entry and search at another time.

Expiration of order.
37(7) An order made under subsection (2) shall name a date on which it expires, which shall be a date not later than six months after it is made unless the court is satisfied that a longer period of time is necessary in the circumstances.

When application may be made.
37(8) An application under subsection (1) or (2) may be made in an application for custody or access or at any other time.

Application to prevent unlawful removal of child.
38(1) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person prohibited by court

order or separation agreement from removing a child from Ontario proposes to remove the child from Ontario, the court in order to prevent the removal of the child from Ontario may make an order under subsection (3).

Application to ensure return of child.
38(2) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person entitled to access to a child proposes to remove the child from Ontario and is not likely to return the child to Ontario, the court in order to secure the prompt, safe return of the child to Ontario may make an order under subsection (3).

Order by court.
38(3) An order mentioned in subsection (1) or (2) may require a person to do any one or more of the following:

1. Transfer specific property to a named trustee to be held subject to the terms and conditions specified in the order.
2. Where payments have been ordered for the support of the child, make the payments to a specified trustee subject to the terms and conditions specified in the order.
3. Post a bond, with or without sureties, payable to the applicant in such amount as the court considers appropriate.
4. Deliver the person's passport, the child's passport and any other travel documents of either of them that the court may specify to the court or to an individual or body specified by the court.

Idem, provincial court (family division).
38(4) A provincial court (family division) shall not make an order under paragraph 1 of subsection (3).

Terms and conditions.
38(5) In an order under paragraph 1 of subsection (3), the court may specify terms and conditions for the return or the disposition of the property as the court considers appropriate.

Safekeeping.
38(6) A court or an individual or body specified by the court in an order under paragraph 4 of subsection (3) shall hold a passport or travel document delivered in accordance with the order in safekeeping in accordance with any directions set out in the order.

Directions.
38(7) In an order under subsection (3), a court may give such directions in respect of the safekeeping of the property, payments, passports or travel documents as the court considers appropriate.

Contempt of orders of provincial court (family division).
39(1) In addition to its powers in respect of contempt, every provincial court (family division) may punish by fine or imprisonment, or both, any wilful contempt of or resistance to its process or orders in respect of custody of or access to a child, but the fine shall not in any case exceed $1,000 nor shall the imprisonment exceed ninety days.

Conditions of imprisonment.
39(2) An order for imprisonment under subsection (1) may be made conditional upon default in the performance of a condition set out in the order and may provide for the imprisonment to be served intermittently.

Information as to address.
40(1) Where, upon application to a court, it appears to the court that,

(a) for the purpose of bringing an application in respect of custody or access under this Part; or
(b) for the purpose of the enforcement of an order for custody or access,

the proposed applicant or person in whose favour the order is made has need to learn or confirm the whereabouts of the proposed respondent or person against whom the order referred to in clause (b) is made, the court may order any person or public body to provide the court with such particulars of the address of the proposed respondent or person against whom the order referred to in clause (b) is made as are contained in the records in the custody of the person or body, and the person or body shall give the court such particulars as are contained in the records and the court may then give the particulars to such person or persons as the court considers appropriate.

Exception.
40(2) A court shall not make an order on an application under subsection (1) where it appears to the court that the purpose of the application is to enable the applicant to identify or to obtain particulars as to the identity of a person who has custody of a child, rather than to learn or confirm the whereabouts of the proposed respondent or the enforcement of an order for custody or access.

Compliance with order.
40(3) The giving of information in accordance with an order under subsection (1) shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law rule of confidentiality.

Section binds Crown.
40(4) This section binds the Crown in right of Ontario.

Courts of Justice Act, S.O. 1984, c.11, as amended

Investigation and report of Official Guardian.
125(1) In a proceeding under the *Divorce Act, 1985* (Canada) or the *Children's Law Reform Act* in which a question concerning custody of or access to a child is before the court, the Official Guardian may cause an investigation to be made and may report and make recommendations to the court on all matters concerning custody of or access to the child and the child's support and education.

125(2) The Official Guardian may act under subsection (1) on his or her own initiative, at the request of a court or at the request of any person.

125(3) An affidavit of the person making the investigation, verifying the report as to facts that are within the person's knowledge and setting out the source of the person's information and belief as to other facts, with the report attached as an exhibit thereto, shall be served on the parties and filed and on being filed shall form part of the evidence at the hearing of the proceeding.

125(4) Where a party to the proceeding disputes the facts set out in the report, the Official Guardian shall if directed by the court, and may when not so directed, attend the hearing on behalf of the child and cause the person who made the investigation to attend as a witness.

PRINCE EDWARD ISLAND

Custody Jurisdiction and Enforcement Act, R.S.P.E.I. 1988, c. C-33.

Purposes.
2 The purposes of this Act are...
(d) to provide for the more effective enforcement of custody and access orders...

Access includes certain information.
3(5) The entitlement to access to a child includes the right to make reasonable inquiries and to be given information as to the health, education and welfare of the child.

Idem.
4(2) On an application under this section, the court may require the Director of Child Welfare to cause an investigation to be made and to report to the court on all matters relating to the custody, maintenance and education of the child.

Enforcement

Order where child unlawfully withheld.
21(1) Where a court is satisfied upon application by a person in whose favour an order has been made for custody of or access to a child that there are reasonable and probable grounds for believing that any person is unlawfully withholding the child from the applicant, the court by order may authorize the applicant or someone on his behalf to apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access, as the case may be.

Order to locate and take child.
21(2) Where a court is satisfied upon application that there are reasonable and probable grounds for believing that
(a) any person is unlawfully withholding a child from a person entitled to custody of or access to the child;
(b) a person who is prohibited by court order or separation agreement from removing a child from the province proposes to remove the child or have the child removed from the province; or
(c) a person who is entitled to access to a child proposes to remove the child or to have the child removed from the province and that the child is not likely to return,
the court by order may direct the sheriff or a police force, or both, having jurisdiction in any area where it appears to the

court that the child may be, to locate, apprehend and deliver the child to the person named in the order.

Application without notice.
21(3) An order may be made under subsection (2) upon an application without notice where the court is satisfied that it is necessary that action be taken without delay.

Duty to act.
21(4) The sheriff or police force directed to act by an order under subsection (2) shall do all things reasonably able to be done to locate, apprehend and deliver the child in accordance with the order.

Entry and search.
21(5) For the purpose of locating and apprehending a child in accordance with an order under subsection (2), a sheriff or a member of a police force may enter and search any place where he has reasonable and probable grounds for believing that the child may be with such assistance and such force as are reasonable in the circumstances.

Time.
21(6) An entry or a search referred to in subsection (5) shall be made only between sunrise and sunset unless the court, in the order, authorizes entry and search at another time.

Expiration of order.
21(7) An order made under subsection (2) expires six months after the day on which it was made, uless the order specifically provides otherwise.

When application may be made.
21(8) An application under subsection (1) or (2) may be made in an application for custody or access or at any other time.

Application to prevent unlawful removal of child.
22(1) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person prohibited by court order or separation agreement from removing a child from the province proposes to remove the child from the province, the court in order to prevent the removal of the child from the province may make an order under subsection (3).

Application to ensure return of child.
22(2) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person entitled to access to a child proposes to remove the child from the province and is

not likely to return the child to the province, the court in order to secure the prompt, safe return of the child to the province may make an order under subsection (3).

Order by court.
22(3) An order mentioned in subsection (1) or (2) may require a person to do any one or more of the following:

1. Transfer specific property to a named trustee to be held subject to the terms and conditions specified in the order.
2. Where payments have been ordered for the support of the child, make the payments to a specified trustee subject to the terms and conditions specified in the order.
3. Post a bond, with or without sureties, payable to the applicant in such amount as the court considers appropriate.
4. Deliver the person's passport, the child's passport and any other travel documents of either of them that the court may specify to the court or to an individual or body specified by the court.

Terms and conditions.
22(4) In an order under paragraph 1 of subsection (3), the court may specify terms and conditions for the return or the disposition of the property as the court considers appropriate.

Safekeeping.
22(5) A court or an individual or body specified by the court in an order under paragraph 4 of subsection (3) shall hold a passport or travel document delivered in accordance with the order in safekeeping in accordance with any directions set out in the order.

Directions.
22(6) In an order under subsection (3), a court may give such directions in respect of the safekeeping of the property, payments, passports or travel documents as the court considers appropriate.

Information as to address.
25(1) Where, upon application to a court, it appears to the court that for the purpose of

(a) bringing an application in respect of custody or access; or

(b) the enforcement of an order for custody or access,

the proposed applicant or person in whose favour the order is made has need to learn or confirm the whereabouts of the proposed respondent or person against whom the order referred to in clause (b) is made, the court may order any person or public body to provide the court with such particulars of the address of the

proposed respondent or person against whom the order referred to in clause (b) is made as are contained in the records in the custody of the person or body, and the person or body shall give the court such particulars as are contained in the records and the court may then give the particulars to such person or persons as the court considers appropriate.

Exception.
25(2) A court shall not make an order on an application under subsection (1) where it appears to the court that the purpose of the application is to enable the applicant to identify or to obtain particulars as to the identity of a person who has custody of a child, rather than to learn or confirm the whereabouts of the proposed respondent or the enforcement of an order for custody or access.

Compliance with order.
25(3) The giving of information in accordance with an order under subsection (1) shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law rule of confidentiality.

SASKATCHEWAN

The Children's Law Act, S.S. 1990, c. C 8.1

Part II
Custody and Access

6(5) When making an order pursuant to subsection (1), the court shall:

(a) give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person seeking custody to facilitate that contact; and

(b) include in the order a condition requiring any person who has custody of a child and who intends to change the place of residence of that child to notify:

(i) at least 30 days before the change; or

(ii) within any other period before the change that the court may specify;

any person who is granted access to that child or any other person who has custody of that child of:

(iii) the change;

(iv) the time at which the change will be made; and

(v) the new place of residence of the child.

9(2) Unless otherwise ordered by the court, a parent who is granted access to a child has the same right as the custodial parent to make inquiries and be given information concerning the health, education and welfare of the child.

9(3) The right of a parent who is granted access described in subsection (2) is not, unless the court orders otherwise, a right to be consulted about or to participate in the making of decisions by the custodial parent.

Mediation.

10(1) On an application by an applicant or respondent pursuant to this Part or Part III or IV, the court, by order, may appoint a person to mediate a matter that:

(a) is dealt with in the application; and

(b) is at issue between the parties.

10(2) No person shall be appointed as a mediator without that person's consent.

10(3) Evidence:

(a) arising from anything said;
(b) of anything said; or
(c) of an admission or communication made in the course of the mediation;

is not admissible in a proceeding except with the written consent of all parties to the proceeding in which the mediator was appointed.

10(4) The court shall specify in an order made pursuant to subsection (1) the amount of the mediator's fees and expenses that each party is required to pay.

10(5) The court may order that one party pay all of the mediator's fees and expenses where the court is satisfied that payment would cause the other party serious financial hardship.

10(6) Where the mediator and the parties are unable to resolve the matter, either party, at any time after the first mediation session, may discontinue the mediation and proceed to have the matters at issue between the parties resolved by the court.

Part IV
Custody and Access Enforcement

Interpretation of Part.

22 In this Part:

(a) "access" means access to a child at specific times or on specific dates;
(b) "agreement" means an agreement that is enforceable under the laws of the jurisdiction in which it was made and that includes a provision for custody or access;
(c) "order" means an order of a court or an extra-provincial tribunal that includes a provision for custody or access.

Order where child unlawfully withheld

24(1) Where a court is satisfied on application that there are reasonable and probable grounds for believing that a person:

(a) is unlawfully withholding a child from a person entitled to custody of or access to the child pursuant to an order or agreement;
(b) who is prohibited by order or agreement from removing a child from Saskatchewan intends to remove the child or have the child removed from Saskatchewan; or
(c) who is entitled to access to a child pursuant to an order or agreement intends to remove the child or to have the child removed from Saskatchewan and that the child is not likely to return;

the court, by order, may direct a sheriff, peace officer or other person that it considers appropriate to locate, apprehend and deliver the child to a person specified by the court for the purpose of giving effect to the rights of the applicant to custody or access.

24(2) For the purpose of enforcing an order made pursuant to subsection (1), the court may authorize the sheriff, peace officer or other person to enter and search any place where the sheriff, peace officer or other person has reasonable and probable grounds for believing that the child may be.

24(3) An application pursuant to subsection (1) may be made *ex parte* where the court is satisfied that it is necessary that action be taken without delay.

24(4) The sheriff, peace officer or other person directed to act by an order made pursuant to subsection (1) shall do all things reasonably able to be done to locate, apprehend and deliver the child in accordance with the order.

Appplication to prevent removal of child.
25(1) Where a court, on application, is satisfied on reasonable and probable grounds that a person:

(a) prohibited by order or agreement from removing a child from Saskatchewan intends to remove the child from Saskatchewan; or

(b) entitled to access to a child pursuant to an order or agreement intends to remove the child from Saskatchewan and is not likely to return the child to Saskatchewan;

the court, to prevent the removal of the child from Saskatchewan or to secure the child's prompt safe return to Saskatchewan, may:

(c) order a person to transfer specific property to a named trustee to be held subject to any terms and conditions that the court considers appropriate;

(d) in the case of a person from whom paymets have been ordered to be made for the maintenance of the child, order a person to make the payments to a specified trustee subject to any terms and conditions that the court considers appropriate;

(e) order a person to post a bond, with or without sureties, payable to the applicant in the amount the court considers appropriate;

(f) order a person to deliver the person's passport, the child's passport and any other travel documents of either of them that the court may specify to the court or to a person specified by the court;

(g) vary the custody or access order or, where the custody or access provisions are contained in an agreement, make a custody order or an access order, or
(h) make one or more of the orders described in clauses (c) to (g).

25(2) In an order made pursuant to subsection (1), the court may:
(a) specify terms and conditions for the return or disposition of the property or payments; or
(b) give directions with respect to the safekeeping of the property, passports or travel documents.

Enforcement of access.
26(1) Where a court, on application, is satisfied that a person entitled to access to a child pursuant to an order or agreement has been wrongfully denied access to the child by the respondent and is of the opinion that it is in the best interests of the child the court may, by order:
(a) require the respondent to give the applicant compensatory access to the child for the period:
(i) agreed to by the parties; or
(ii) that the court considers appropriate if the parties do not agree;
(b) require supervision of the access in any manner that the court considers appropriate;
(c) require the respondent to give security for the performance of the obligation to give the applicant access to the child;
(d) appoint a mediator pursuant to section 10 to assist them in resolving the issue;
(e) make or vary a custody order or access order; or
(f) direct all or any combination of the things mentioned in clauses (a) to (e) to be done.

26(2) Where a court, on application, is satisfied that a person entitled to access to a child pursuant to an order or agreement has wrongfully failed to exercise the right of access or to return the child as the order or agreement requires, and is of the opinion that it is in the best interests of the child, the court may be order:
(a) require supervision of the access in any manner that the court considers appropriate;
(b) require the respondent to give security for the performance of the obligation to:
(i) exercise the right of access; or
(ii) return the child as the order or agreement requires;

(c) appoint a mediator pursuant to section 10 to assist them in resolving the issue;
(d) require the respondent to provide the respondent's address and telephone number to the applicant;
(e) make or vary a custody order or access order; or
(f) direct all or any combination of the things mentioned in clauses (a) to (e) to be done.

26(3) A denial of access or failure to exercise the right of access or to return the child as the order or agreement requires is wrongful unless:
(a) it is justified by a legitimate reason; and
(b) the respondent gave the applicant reasonable notice of the failure and of the reason.

26(4) At the hearing of an application pursuant to this section, unless the court orders otherwise, evidence is admissible only if it is directly related to:
(a) the alleged wrongful denial of access or failure to exercise the right of access or to return the child as the order or agreement requires; or
(b) the respondent's reasons for the denial of access or failure to exercise the right of access or to return the child as the order or agreement requires.

26(5) This section does not apply to a denial of access or failure to exercise a right of access or to return a child as the order or agreement requires that occurred before this Act comes into force.

26(6) Where the court is satisfied that a person has made a frivolous or vexatious application pursuant to this section, the court may prohibit that person from making further applications without leave of the court.

26(7) No person shall be ordered to supervise access pursuant to clause (1)(b) or (2)(a) without his or her consent.

Payment of expenses.
27 On an application pursuant to this Part or *The International Child Abduction Act*, a court may order a respondent to pay necessary expenses incurred or to be incurred by the applicant, including:
(a) travel expenses;
(b) the costs of locating and returning a child;
(c) lost wages;
(d) expenses reimbursed pursuant to section 7 of *The Child and Family Services Act**;

(e) legal fees; and
(f) any other expenses the court may allow.
*Relates to expenses incurred by the government.

Information as to address.
28(1) Where, on application, the court is satisfied that a person requires an order pursuant to this section in aid of an application to:
(a) obtain or enforce a custody or access order; or
(b) enforce a custody or access agreement;
it may order any person or public body, including the Crown, to provide the applicant or any other person who the court considers appropriate with any information in the possession or control of the person or public body with respect to the location, address or place of employment of the person against whom the custody or access order is sought to be obtained or the order or agreement is sought to be enforced.

28(2) Subsection (1) does not apply to information that is subject to solicitor-client privilege.

28(3) Subject to subsection (2), an order made pursuant to subsection (1) applies notwithstanding any other Act or law restricting the disclosure of the information.

28(4) Where the court makes an order pursuant to subsection (1), it may make any order with respect to the confidentiality to be maintained in connection with the information released that it considers appropriate.

Contempt of court.
29(1) Where a court on its own motion or on application by notice of motion is satisfied that any person has displayed wilful contempt of its orders or resistance to its process or orders with respect to custody of or access to a child, the court, in addition to any other remedy including variation of the custody or access order, may impose:
(a) in the case of a first finding of contempt:
(i) a fine of not more than $5,000;
(ii) imprisonment for a term of not more than three months; or
(iii) both that fine and imprisonment; and
(b) in the case of a second or subsequent finding of contempt:
(i) a fine of not more than $10,000;
(ii) imprisonment for a term of not more than two years; or
(iii) both that fine and imprisonment.

29(2) Where the court imposes a sentence of imprisonment pursuant to subsection (1) that does not exceed 90 days, it may:

(a) order that the sentence be served intermittently at those times that are specified in the order; and

(b) direct that the person at all times when not in confinement pursuant to the order, comply with conditions prescribed in the order.

29(3) The court may order that if a person defaults in payment of a fine imposed pursuant to subsection (1) that person shall be imprisoned for a period not exceeding six months.

29(4) Proceeding pursuant to subsection (1) may be taken without having taken any oter step for the enforcement of the order.

29(5) The sheriff, or any other officer or person by his or her direction or by direction of the court, may convey any person to be committed to a prison without any further warrant other than a copy of the minutes of the court certified by a judge or the registrar.

29(6) The keeper of the prison and all other persons whose duty it is to receive the person to be committed into custody are authorized to and shall:

(a) receive the person to be committed into custody; and

(b) carry out and execute the order according to its tenor and effect.

YUKON

Children's Act, R.S.Y. 1986, c.22, as amended

Part 2
Custody, Access and Guardianship

Purposes of Part 2.
29 The purposes of this Part are...
(d) to provide for the more effective enforcement of custody and access orders...

Best interests of child.
30(1) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, the Court shall consider all the needs and circumstances of the child including...
(g) the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child.

31(5) The entitlement to access to a child includes the rights to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

31(6) In addition to rights referred to in subsection (5), the parent not having care of a child shall have
(a) the right to consent to the adoption or marriage of his minor child; and
(b) the right to give consent to urgent medical treatment for his or her child where the consent of the parent entitled to the care and custody of the child cannot expeditiously be obtained.

35(1) Where an order is made for custody of or access to a child, the Court may give such directions as it considers appropriate for the supervision of the custody or access by a person, who has consented so to act.

Order for mediation.
42(1) In an application for custody of or access to a child, the Court, at the request of the parties, may appoint a person selected by the parties to mediate any matter specified in the order.

42(2) The Court shall not appoint a person under subsection (1) unless the person

(a) has consented to act as mediator, and

(b) has agreed to file a report with the Court within the period of time specified by the Court.

42(3) It is the duty of a mediator to confer with the parties and endeavour to obtain an agreement in respect of the matter he is appointed to mediate.

42(4) Before entering into mediation on the matter, the parties shall decide whether,

(a) the mediator is to file with the Court a full report on the mediation, including anything that the mediator considers relevant to the matter in mediation; or

(b) the mediator is to file with the Court a report that either sets out the agreement reached by the parties or states only tha the parties did not reach agreement on the matter.

42(5) The mediator shall file his report with the clerk of the Court in the form decided upon by the parties.

42(6) The clerk of the court shall give a copy of the report to each of the parties and to counsel, if any, representing the child.

42(7) Where the parties have decided that the mediator's report is to be in the form described in paragraph (4)(b), evidence of anything said or of any admission or communication made in the course of the mediation is not admissible in any proceeding except with the consent of all parties to the proceeding in which the order was made under subsection (1).

42(8) The Court may order the parties to pay the fees and expenses of the mediator.

42(9) The Court may specify in the order the proportions or amounts of the fees and expenses that each party is to pay.

Request for investigation.

43(1) In an application under this Part in respect of a child, the Court may request the Director of Family and Children's Services appointed under section 108 to cause an investigation to be made and to report to the court upon all matters relating to the custody, support and education of the child.

43(2) The Director shall have no obligation to prepare a report or to prepare a report within a stipulated period unless he consents to or has given a prior written report.

Order for apprehension of a child.

46(1) Where the Court is satisfied by a person in whose favour an order has been made in relation to custody of or access to a child that there are reasonable and probable grounds for believing that any person is unlawfully withholding the child from the applicant, the court may authorize the applicant or someone on his behalf to apprehend the child for the purpose of giving effect to the rights of the applicant in relation to custody or access, as the case may be.

46(2) Where the Court is satisfied that there are reasonable and probable grounds for believing,

(a) that any person is unlawfully withholding a child from a person entitled to custody of or access to the child, or

(b) that a person who is prohibited by court order or separation agreement from removing a child from Yukon proposes to remove the child or have the child removed from Yukon, or

(c) that a person who is entitled to access to a child proposes to remove the child or to have the child removed from Yukon and is not likely to return the child to Yukon,

the Court may direct the sheriff or a police officer, or both, having jurisdiction in any area where it appears to the Court that the child may be, to locate, apprehend and deliver the child to the person named in the order.

46(3) An order may be made under subsection (2) upon an application made without notice where the court is satisfied that it is necessary that an order should be made without delay.

46(4) The sheriff or police officer directed to act by an order under subsection (2) shall do all thinkgs reasonably able to be done to locate, apprehend and deliver the child in accordance with the order

46(5) For the purpose of locating and apprehending a child in accordance with an order under subsection (2), a sheriff or a member of a police force may with such assistance and such force as is reasonable, enter and search any place where he has reasonable and probable grounds for believing and does believe that the child may be.

46(6) An entry or a search referred to in subseciton (5) shall be made only between 6 o'clock in the forenoon and 9 o'clock in the afternoon unless the Court, in the order, authorizes entry and search at another time.

46(7) An order made under subsection (2) shall name a date on which it expires, and that date shall be not later than one month after the order is made unless the Courtk, before the order expires, is satisfied that a longer period of time is necessary and grants an extension.

46(8) An application under subsection (1) or (2) may be made with or separately from an application for custody or access.

Orders preventing removal of children from the Yukon.

47(1) Where the Court is satisfied upon reasonable and probable grounds that a person prohibited by court order or an agreeent from removing a child from Yukon proposes to remove the child from yukon, the Court, in order to prevent the removal of the child from Yukon, may make an order under subsection (3).

47(2) Where the Court is satisfied upon reasonable and probable grounds that a person entitled to access to a child proposes to remove the child from Yukon and is not likely to return the child to Yukon, the Court, in order to secure the prompt, safe return of the child to Yukon may make an order under subsection (3).

47(3) An order mentioned in subsection (1) or (2) may require a person to do any one or more of the following:

(a) pay into Court or transfer property to a trustee to be held subject to the terms and conditions specified in the order;

(b) where payments have been ordered for the support of the child, make the payments into Court or to a trustee subject to the terms and conditions specified in the order;

(c) post a bond or other similar instrument satisfactory to the Court, with or without sureties, payable to the applicant in such amount as the court considers appropriate;

(d) deliver the person's passport, the child's passport and any other travel documents of either of them to the Court or to a person or public body specified by the Court.

47(4) In an order under paragraph (a) of subsection (3), the Court may specify terms and conditions for the return or the disposition of the property as the court considers appropriate.

47(5) A person or public body specified by the court in an order under paragraph (d) of subsection (3) shall hold a passport or tavel document delivered pursuant to the order in safekeeping in accordance with any directions set out in the order.

47(6) In an order under subsection (3), the Court may give such direcions in respect of the safekeeping of the property, pay-

ments, passports or travel documents as the court considers appropriate.

Order to provide information about whereabouts of respondent.

48(1) Where it appears to the Court that,

(a) for the purpose of bringing an application in respect of custody or access under this Part; or

(b) for the purpose of the enforcement of an order for custody or access,

the proposed applicant or person in whose favour the order is made needs to learn or confirm the whereabouts of the proposed respondent or person against whom the order referred to in paragraph (b) is made, the Court may order any person or public body to provide the Court with such particulars of the address of the proposed respondent or person against whom the order referred to in paragraph (b) is made as are contained in the records in the custody of the person or body, and the person or body shall give the Court such particulars as are contained in the records and the Court may then give the particulars to such person or persons as the court considers appropriate.

48(2) The Court shall not make an order on an application under subsection (1) where it appears to the Court that the purpose of the application is to enable the applicant to identify or to obtain particulars as to the identity of a person who has custody of a child, rather than to learn or confirm the whereabouts of the proposed respondent or the enforcement of an order for custody or access.

48(3) The giving of information in accordance with an order under subsection (1) shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law fule of confidentiality.

48(4) This section binds the Government of the Yukon Territory.

CANADA

Criminal Code, R.S.C. 1985, c. C-46

Disobeying order of court - Attorney General of Canada may act.
127(1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exeeding two years.

127(2) Where the order referred to in subsection (1) was made in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any proceedings in respect of a contravention of or conspiracy to contravene that order may be instituted and conducted in like manner.

Abduction in contravention of custody order.
282 Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, the possession of that person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
(b) an offence punishable on summary conviction.

Abduction where no custody order - consent required.
283(1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in relation to who no custody order has been made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of

(a) an indictable offce and liable to imprisonment for a term not exceeding ten years; or
(b) an offence punishable on summary conviction.

283(2) No proceedings may be commenced under subsection (1) without the consent of the Attorney General or counsel instructed by him for that purpose.

Defence.
284 No one shall be found guilty of an offence under sections 281 to 283 if he establishes that the taking, enticing away, concealing detaining, receiving or harbouring of any young person was done with the consent of the parent, guardian or other person have the lawful possession, care or charge of that young person.

285 No one shall be found guilty of an offence under sections 280 to 283 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any your person was necessary to protect the young person from danger of imminent harm.

No defence.
286 In proceedings in respect of an offence under sections 280 to 283, it is not a defence to any charge that a young person consented to or suggested any conduct of the accused.

Divorce Act, R.S.C. 1985 (2nd Supp.), c.3, as amended.

Access.
16(5) Unless the court orders otherwise, a spuse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

Order respecting change of residence.
16(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

Maximum contact.
16(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should

have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Family Orders and Agreements Enforcement Assistance Act, R.S.C. 1985 (2nd Supp.), c.4

Definitions.
2 In this Part,
"access right" means a right, granted in an order or agreement, of access to or visitation of a child;
"family provision" means a support provision, a custody provision or an access right;
"order" means any order or judgment or interim order or judgment, relating to family support, custody or access that is enforceable in a province;

Applications to court.
7 The following may, by *ex parte* application, apply to a court for the following purposes:
(a) any person, service, agency or body entitled to have a family provision enforced may request that the court apply for the release to the court of information under this Part; and
(b) a peace officer investigating a child abduction pursuant to section 282 or 283 of the *Criminal Code* may request that the peace officer be granted an authorization to apply for the release of information under this Part.

Applications in relation to family provisions.
8(1) An application under section 7 in relation to a family provision must be accompanied by
(a) a certified copy of the order, or a copy of the agreement, containing the support provision, custody provision or access right to which the application relates;
(b) an affidavit in accordance with section 9; and
(c) subject to subsection (2), proof, as supplied by the province where the court seized of the application has jurisdiction, that the provincial information banks designated with respect to that province have been searched for information helpful in locating, as the case may be, the person who is in arrears under the support provision or the child or children who is or are the object of the custody provision or access right.

8(2) The proof referred to in paragraph (1)(c) is not necessary where the affidavit in support of the application discloses that there are reasonable grounds to believe that the person, child or children referred to in that paragraph has or have left the province of the court seized of the application.

Contents of affidavit.

9 An affidavit in support of an application under section 7 in relation to a family provision must

(a) allege a breach of the family provision;

(b) set out particulars of the breach and identify the person who

(i) where the family provision is a support provision, is in arrears, or

(ii) where the family provisions is a custody provision or access right, is believed to have possession of the child or children who is or are the object of the custody provision or access right;

(c) disclose that reasonable steps have been taken to locate the person who is in arrears or the child or children who is or are the object of the custody provision or access right and that the person, child or children have not been located;

(d) set out particulars of the reasonable steps referred to in paragraph (c); and

(e) where the affidavit is not accompanied by the proof referred to in paragraph 8(1)(c), disclose that there are reasonable grounds to believe that the person, child or children referred to in paragraph (c) has or have left the province of the court seized of the application to which the affidavit relates and set out information in support of that belief.

Court shall grant authorization.

12 A court seized of a vaild application under section 7 shall, if it is satisfied

(a) that reasonable steps have been taken to locate the person, child or children to whom the application relates, and

(b) where it is alleged that the person, child or children to whom the application relates has or have left the province of the court, that the allegation is based on reasonable grounds,

grant an authorization in writing authorizing any judge of that court or any officer thereof, or the peace officer, as the case may be, to apply for the relase of information under this Part.

Applications for the Release of Information

Applications for the release of information.

13 Subject to this Part, the following, namely,

(a) a judge of a court or any officer thereof or a peace officer investigating a child abduction pursuant to section 282 or 283 of the *Criminal Code*, if authorized to do so under section 12, or

(b) a provincial enforcement service,

may apply to the Minister to have the information banks referred to in section 15 searched for the information referred to in section 16 and to have any such information found therein released on a confidential basis.

Form of application.

14(1) An application under section 13 for the release of information must contain the information and be in the form prescribed by the regulations.

14(2) Where an application under section 13 is made by a person referred to in paragraph 13(a), the application must be accompanied by

(a) a copy of the family provision or the informaiton, as the case may be, to which the application relates;

(b) the applicant's authorization under section 12;

(c) a copy of the affidavit submitted in support of the application for the authorization; and

(d) where the applicant's affidavit does not contain the allegation referred to in paragraph 9(e) or 11(c), proof, as supplied by the province where the court that granted the authorization has jurisdiction, that the provincial information banks designated with respect to that province have been searched for information helpful in locating the person, child or children to whom the application relates.

14(3) Where an application under section 13 is made by a provincial enforcement service, the application must be accompanied by

(a) a copy of the family provision to which the application relates; and

(b) an affidavit, signed by an officer of the provincial enforcement service, in accordance with subsection (4).

14(4) An affidavit referred to in paragraph (3)(b) must

(a) allege a breach of the family provision;

(b) set out particulars of the breach and identify the person who

(i) where the family provision is a support provision, is in arrears, or

(ii) where the family provision is a custody provision or an access right, is believed to have possession

of the child or children who is or are the object of the custody provision or access right;

(c) disclose that reasonable steps have been taken to locate the person who is in arrears or the child or children who is or are the object of the custody provision or access right and that the person, child or children has or have not been located;

(d) set out particulars of the reasonable steps referred to in paragraph (c); and

(e) disclose

(i) that the provincial information banks designated with respect to the province of the provincial enforcement service have been searched for information helpful in locating the person who is in arrears or the child or children who is or are the object of the custody provision or access right, or

(ii) that there are reasonable grounds to believe that the person, child or children referred to in subparagraph (i) has or have left the province of the provincial enforcement service, and set out information in support of that belief.

Information banks may be searched.

15 The information banks that may be searched under this Part are the information banks designated by the regulations from among the information banks controlled by the Department of National Health and Welfare and those controlled by the Canada Employment and Immigration Commission.

Information that may be released.

16 The information that may be searched for and released under this Part is

(a) the address of the person who, as the case may be,

(i) is in arrears under the support provision to which the application relates,

(ii) is believed to have possession of the child or children who is or are the object of the custody provision or access right to which the applicaton relates, or

(iii) is believed to have possession of the child or children who is or are the object of the investigation pursuant to section 282 or 283 of the *Criminal Code* to which the application relates;

(b) the name and address of the employer of the person referred to in paragraph (a);

(c) the address of the child or children to whom the application relates; and

(d) the name and address of the employer of every child to whom the application relates.

Transfer of information between information banks.

18 Subject to the regulations, information in any information banks that may be searched under this Part may be released by one information bank director to the other informaton bank director to assist that other director in conducting a search under this Part.

Transmission of information to Minister.

19 Where information requested in an application under section 13 is found in an information bank that may be searched under this Part, the information bank director of that information bank shall cause the information to be transmitted to the Minister in accordance with the regulations.

Release of information to applicant.

20 The Minister shall release information under this Part to an applicant under section 13 only if the Minister is satisfied that the safeguards established by the agreement under section 3 with the province of that applicant are in place.

Exception for security name changes.

21 No information may be released under this Part in respect of any person whose identity has been changed for security or law enforcement purposes.

APPENDIX C
SELECTED ANNOTATED BIBLIOGRAPHY

Albert, James A. and Gregory A. Brodek, "Habeas Corpus - a Better Remedy in Visitation Denial Cases", (1989) 41 Maine Law Review 239.

This recent American article is based on the premise that there is a "raging visitation problem", and argues that visitation with the non-custodial parent is vital to children, and that existing remedies for enforcement of access denial - cessation of support payments, contempt, modification of custody and tort claims - are sorely inadequate for a number of reasons, including cost and delay. The authors promote the use of the writ of habeas corpus as the most effective relief. The authors give a fairly good overview of American law on access enforcement, although the treatment lacks somewhat in thoroughness and authoritativeness. The large part of the article devoted to habeas corpus is not very useful in a Canadian context as, in our view, the remedy only addresses only one aspect of the access problem which is reasonably under control, at least in Canada. For example, the police in Manitoba will immediately enforce a specified access order and require a custodial parent to turn the child over to the access parent. The problem is the need for involvement of the police and repeated and insidious violations of access.

Allen, Cecelia T., "Interference with Visitation as an Independent Tort" (1985-86), 24 J. Fam. L. 481.

This American article starts by analyzing the rights of non-custodial parents to visitation. It looks briefly at traditional enforcement methods for ensuring that the non-custodial parent gets visitation (change of custody, suspension of support payments, etc.) and explains why the author believes they are ineffective. As an alternative to the traditional methods, the author advocates the tort of intentional infliction of emotional distress and the tort of interference with visitation. The author feels the threat of financial sanction might help parents to cooperate with each other. She feels this is more effective than suspension of support payments because theoretically the child is not affected by this financial sanction.

Ashman, A., "Tortious Interference with Parental Visitation Rights" (Nov., 1984), 70 A.B.A.J. 122.

In Ruffalo v. United States, 590 F. Supp. 706 (W.D.M. 1984), the U.S. District Court for the Western District of Missouri recognized that the intentional interference with court-ordered parental visitation rights is an actionable tort under Missouri law. The state had to pay damages becasue the government interfered with the mother's visitation by hiding the father and son under the Witness Protection Program. This article reports on this case.

Berman G. and L. Berman, "Comments on the Law of Access" (1979), 9 R.F.L. (2d) 69.

This article does not deal explicitly with access enforcement although the authors' views on access generally suggest they would be opposed to it. The authors endorse the approach taken by Goldstein, Freud and Solnit in **Beyond the Best Interest of the Child** *infra*, a view in vogue in some quarters at the time the article was written.

The authors feel that if a case goes to litigation, then reason, cooperation and mediation have all failed so the court should defer to the primacy of the custodial family and not force access. "At all stages...one must bear in mind the basic flaw inherent in all access arrangements. Access forces the continuation of a cooperative relationship between estranged parties. Experience shows that when these parties have been engaged in bitter conflicts it is unlikely that access arrangements will function satisfactorily",(at 70). The authors note that "in the field of access, more than in any other area of law, the court must depend on the opposing parties to carry out the spirit of the order. The court is powerless to influence the subtle derogation of the custodian by a resentful former spouse, or the moment of tension in the mother's face which reveals to the child that it is better not to enjoy the father's visits." (at 73). The authors suggest that tension between the parents may do more harm then visits do good. "Insofar as it will distort the practical or emotional life of a family, access should be regarded with caution if it contravenes the wishes of the custodial parent. At the same time, the court is naturally very reluctant to deny access to an interested parent, particularly if the custodial parent is not entirely co-operative...(D)espite the patent unfairness to a parent denied access, it is sometimes better that he or she should bear the burden of the loss than that the court should gamble with the welfare of the child." (at 74).

Bousquet, Thomas G. "Establishing Visitation Rights: What Is Fair to All Concerned" (1988), 51 Tex. B.J. 676.

The author, a practicing lawyer, discusses the difficulties of enforcing access orders with older teenagers and recommends that the courts should not attempt to force children 15 years and older to visit against their wishes. He suggests that court orders should expressly provide for the older child's agreement balanced by provisions which would require the custodial parent not to make plans which would unreasonably interfere with the access parent's scheduled visits.

Bruch, Carol, "Making Visitation Work: Dual Parenting Orders" (Summer, 1978), 1 Fam. Advocate 22.

The author advocates making visitation orders enforceable against the access parent. The author suggests imposing financial sanctions on the access parent who doesn't fulfill his/her obligation to compensate the custodial parent for inconvenience and monetary loss.

Canada Department of Justice, "Evaluation of the Divorce Act Phase II: Monitoring and Evaluation" (May, 1990).

This study looked at access as part of a larger review of the new divorce act. The data indicates lack of contact between non-custodial parents and their children is rarely due to access denial. Failure to exercise access is the larger problem. The study's findings respecting access are discussed at pp. 110-116 and 134-136.

Crean, Susan, In the Name of the Fathers: The Story behind Child Custody (Toronto: Amanita Enterprizes, 1988).

The author attacks the trend to joint custody from a feminist perspective. She criticizes Ontario's then proposed access enforcement legislation and discusses Manitoba's access assistance program, regarding the latter as a preferable option, as a "much more sophisticated and careful (and costly) approach to the problem of access conflict" at 132. The treatment is journalistic and largely undocumented, but interesting, whatever the reader's point of view. See also "In the Name of the Fathers: Joint Custody and the Anti-Feminist Backlash", February, 1989, This Magazine, 19.

Czapanskiy, Karen, "Child Support and Visitation: Rethinking the Connections" (Spring, 1989), 20 Rutgers Law Journal 619.

This scholarly American article examines the philosophical underpinnings of the rules linking or separating support and access. The author describes the case law in four representative states: California and Pennsylvania, where child support and visitation are always or almost always disconnected; Florida, where child support and visitation are sometimes connected; and New York, where child support and visitation are always or almost always connected. While she notes that there is a trend towards states adopting disconnecting rules, she argues that both connecting and disconnecting rules are gender-biased against women and fail both children and parents. Essentially both are built on, and perpetuate, sex role stereotypes, with women as nurturing care-givers and men as providers. Generally, women are expected to assume the full child care role and men are not expected to share in that responsibility. After separation, the non-custodial father fulfills all his legal obligations by paying child support: the mother shares the economic responsibilities and must also provide all the caretaking.

The author believes that children in separated families do better when both the residential parent and the non-residential parent are actively involved in their lives. She argues that the current rules do not meet the child's needs for both financial support and involvement by both parents. She advocates a new approach which she calls the "dual parent/dual responsibility formula" where both parents would be expected to provide the child with economic support and care. On the average, a non-custodial parent would be expected to provide child care about 20 per cent of the time. She proposes that failure by either parent to fulfill their responsibilities would be subject to judicial sanction.

> "Thus, if a residential parent denied the nonresidential parent regular and appropriate time to provide nurturing for the child, the contempt procedures already available to enforce visitation rights could be invoked. In addition, the nonresidential parent would be entitled to substitute time with the child. At the same time, if a non-residential parent failed to provide physical and emotional nurturance to the child, the court could be asked to intervene. Sanctions would be graduated, beginning with an order that the non-residential parent spend time with the child. If that failed, the non-residential parent would be required to pay for the supplemental care the residential parent supplies because of the default of the nonresidential

parent. If the nonresidential parent still fails to provide physical/emotional nurturance, the residential parent would be given the additional option of denying future visitation altogether so that the parent and the child could rearrange their lives in light of the decision of the nonresidential parent to separate from the child." (References omitted.)

Diamond, Robyn Moglove, "Enforcement of Custody and Access Orders" (1989), 4 C.F.L.Q. 303.

Madame Justice Diamond, formerly Director of the Family Law Branch of the Manitoba Department of Justice, examines the remedies available in Canada to enforce custody and access orders, including criminal remedies in cases of parental child abduction and civil enforcement of access orders. She reviews current remedies for access enforcement (contempt, suspension of child support) and the Supreme Court of Canada decision in **Frame v. Smith**. She outlines Manitoba's access assistance program and Ontario's proposed Bill 124 (now abandoned) and submits that, at 334: "the best way of dealing with the problem of enforcement of access orders would be a combination of the proposed Manitoba Access Assistance Program, which places an emphasis on conciliation and provides Crown lawyers where court action is required, complemented by legislation similar to that which has been introduced in Ontario."

Eaton Taylor, C., "Making Parents Behave: The Conditioning of Child Support and Visitation Rights" (1984), 84 Colum. L. Rev. 1059.

The author deals with what she sees as the American courts' increasing trend to condition visitation on payment of support obligations and vice versa to coerce compliance by both parents with post-divorce obligations. The author looks at the different rationales court use in applying this sanction: a) Contractual: interpreting support and access provisions as mutually dependent provisions of a contract; b) Equity: encouraging self-help by refusing to enforce an order because one parent has "unclean hands"; and c) Invoking the courts' parens patriae jurisdiction to deny visits or forgive support arrears after determining the remedy would not be in the child's best interests.

She concludes that only the parens patriae doctrine provides a valid basis for this conditioning. Even so, she strongly

advocates an individual analysis of each case based on the best interests of the child before conditioning obligations. Her conclusion is basically that conditioning obligations frequently occurs without adequate analysis of the effect on the child and that while it may be appropriate in very limited circumstances, the court should look at alternative methods of ensuring compliance such as garnishment (in the case of non-payment of support) and contempt (for both denial of visitation and non-payment of support). Unfortunately, while she asserts that in most circumstances, the contempt sanction will be a preferable remedy "because of the limited efficacy and the great potential for harm inherent" in conditioning access and support, she skirts the issue of how jailing a custodial parent is less harmful to the child than withholding support. She argues that in most instances terminating spousal support and changing custody are inappropriate remedies: the former because spousal and child support are often inseparable and the latter because it is a radical change that will only be justified in unusual circumstances. The author advocates a "preventative orientation" to access denial by increasing use of mediation, counselling and joint custody.

Farquhar, K.B., "The Hague Convention on International Child Abduction Comes to Canada" (1983-85), 4 Can. J. Fam. L. 5.

As the name suggests, this article is a discussion of the Hague Convention. It goes through the convention explaining how it works, outlining its advantages and pointing out its inadequacies born of the compromises necessary to make an international agreement. One of the limitations pointed out by the author is that the convention has very little concrete to say on the matter of enforcing access rights despite the fact that Article 1(b) says that one of the objects of the Convention is to ensure that rights of access are respected from state to state. "The delegates to the Conference were apparently of the opinion that access rights are so indefinable that it would be impossible to formulate precise rules for their exercise, and that in any event the exercise of access rights depends largely on the attitudes of the individuals concerned." (at 27). The omission of enforcement mechanisms for access rights was, therefore, not an oversight.

Fishbein, Rhonda L., "Visitation Rights: Providing Adequate Protection for the Non-Custodial Parent" (1982), 3 Cardozo L. Rev. 431

This article reviews the traditional remedies in the U.S.: (civil contempt, termination of spousal support and child support, and changed custody) and concludes that they are inadequate to protect the rights of non-custodial parents. The author then goes on to review what she calls the new remedies. She argues that remedies available to custodial parents (statutory provisions re: child-snatching and the tort of intentional infliction of mental distress) could also be used to benefit the non-custodial parent. She summarizes her position as follows:

> The new statutory remedies will improve the position of non-custodial parents. The (Uniform Child Custody Jurisdiction Act) and the Parental Kidnaping Prevention Act will allow the visitation parent to petition the court to issue and help enforce contempt citations. Both Acts can also be employed to require the custodial parent to return to the "home state", to honor the visitation privileges, and to prevent the custodial parent from modifying any provisions concerning support. The Parental Kidnaping Prevention Act can be utilized to enforce visitation rights through its full faith and credit provision as well as to locate a custodial parent who has disappeared with the children by using the Federal Parent Locator Service and the FBI. In addition, the UCCJA could provide the non-custodial parent with compensation for the expenses involved in exercising visitation rights and locating the custodial parent who has tried to remain hidden. The tort remedy, if applied in the visitation situation, would also benefit the non-custodial parent. Emotional anguish, as well as the additional expenses incurred in exercising the right to be with the children, would be compensable.
>
> The statutes and tort action will serve as more effective deterrents because the penalties for violations will be higher than those presently imposed. (at 461, 462) (references omitted).

The author presents a fairly comprehensive overview of American jurisprudence and legislation in this area. The article, like most, suffers from an absence of empirical data to support the author's views of the efficacy of various approaches. Moreover, the discussion of the "statutory" remedies is weak. It is not at all clear how the problems the traditional remedies cannot resolve would be remedied by this legislation with the possible exception of jurisdictional disputes arising in relocation situations. In any event, similar legislation is already in place in Canada.

Furstenberg, Frank F., Jr., S. Philip Morgan and Paul D. Allison, "Paternal Participation and Children's Well-Being After Marital Dissolution" (1987), Amer. Sociological Review, vol 52, 695.

The authors analyzed data from an American panel study of a nationally representative sample of children interviewed in 1976 and 1981 to examine the influence of paternal involvement after separation in children's well-being. The results showed "little, if any, support for the hypothesis that paternal contact is beneficial for the child." On the other hand, the data indicated that "maternal relationships apparently are important for children's well-being." The authors are very cautious about their findings, and although the study says nothing about access enforcement, it is worth noting in contrast to the more conventional wisdom.

Goldman, Lawrence A., "Tortious Interference with Visitation Rights: A New and Important Remedy for Non-custodial Parents" (1986), 20 John Marshall L. Rev. 307.

This American article proceeds on the assumptions that continued contact with the non-custodial parent is beneficial for a child and that custodial parents frequently disrupt access. The author examines the traditional remedies (contempt, change of custody, and withholding of child support) and judges them to be inadequate. Inter alia, they "fail to adequately compensate non-custodial parents", who suffer "an assortment of injuries" from access denial, including emotional distress, physical disorders, and significant financial losses. The author recommends that there should be a specific cause of action for tortious interference with visitation, and discusses the **Ruffalo** decision (see **supra** Ashman article) in some detail.

Goldstein, J.A., A. Freud, and A.J. Solnit, **Beyond the Best Interest of the Child**, New York: MacMillan, 1973).

In this controversial essay, the authors, all psychoanalysts, argue that the child's relationship to his "psychological parent" is critical to his healthy development and that any disruption to this relationship is harmful to the child. Where the parents are in conflict, forced visitation is destructive and therefore the non-custodial parent should have no legally enforceable right to visit the child, and access should be at the custodial parent's total discretion. See also the author's second edition of this work published in 1979 by MacMillan. The authors continue

in their opposition to court enforceable access, but make it clear that they believe access should be encouraged, and indeed that willingness to facilitate access should be a criterion in the custody decision. (at 118)

Gonzalez, E., "Intentional Interference with Visitation Rights: Is this a Tort: **Owens v. Owens**" (1986-87), 47 Louisiana Law Rev. 217.

This American article discusses the tort remedy for enforcing access orders. Louisiana rejected the tort of intentional interference with visitation rights in the case discussed but the author argues that this tort may be of some utility. She notes the possible negative aspects of the tort - that it may promote increased animosity between the parties; that it may burden court dockets; and that it may involve a deprivation of funds from the child - but feels that a system can (and must) be developed to minimize the adverse effects of the tort while maximizing compliance with visitation orders. The author discusses Louisiana's current remedies for enforcing visitation orders which include, since **Owens**, requiring the custodial parent to post a bond or security to ensure compliance.

Grossen, Jacques Michel, "Switzerland: Hard Cases" (1987-88), 26 J. Fam. L. 207.

This short article contains a brief discussion of Swiss law on the enforcement of access orders. It reports a recent court decision that a child should not be physically forced to visit.

Hodges, William F., **Interventions for Children of Divorce: Custody, Access and Psychotherapy** (New York: Wiley, 1986).

This American work presents a psychological perspective on the benefits of access. The chapter on access suggests that visitation should be generally encouraged and supported because it is in the best interests of the child. The author goes into a lot of detail about how to facilitate access (mediation), what kind of access is appropriate at various age levels, etc. The only suggestion for enforcing access is to set up rules to the effect that "if either parent is more than one half hour late for picking the child up (or having the children ready) two times in a month, a $100 bond must be forfeited." (at 189).

Kirkland, James R. and Elaine M. Stoermer, "Visitation: A Vulnerable Right" (1988), 2 Amer. J. of Fam. L. 93.

Written by lawyers in private practice, this article briefly outlines the ways in which custodial parents can frustrate access, practical tips for lawyers in building a case of access denial, and the remedies available in Ohio and elsewhere in the United States.

Landau, B., "Children's Rights to Visitation, Support and the Home" (1988), 3 C.F.L.Q. 55.

The author feels that the child should have a right to independent legal representation both when parents are settling matters by private agreement and waive important rights affecting the child (e.g. no access, no or minimal child support, sale of the marital home) and when the dispute is being resolved by the court. She feels that access to both parents is the right of the child but says nothing about how to enforce any access order or agreement.

Leon, Jeffrey S., "The Wisdom of Solomon: A Comment on **Frame v. Smith**" (1988), 3 C.F.L.Q. 397.

In this case comment, the author, a practising lawyer, reviews the Supreme Court of Canada's decision in **Frame v. Smith**. The author is of the view that access denial is "one of the most trying and difficult issues in family law". He is attracted by the approach taken in dissent by Madame Justice Wilson and suggests that the provinces should enact legislation recognizing the validity of a cause of action for breach of fiduciary obligations between custodial and non-custodial parents. At 402-403, he states:

> "...there seems little justifiable reason to unduly limit the remedies that might be used by a court to redress the wrongs that are suffered. A determined spouse can probably succeed in frustrating access, notwithstanding the efforts of the police, the contempt powers of the Court, or the threats of imprisonment of fine. Still, there are some cases in which the threat of or the commencement of a civil action might do some good towards promoting acceptance of the order of the Court or towards remedying the harm suffered by a non-custodial parent or children. As Wilson J. points out, the courts can be trusted to safeguard the interests of the children in the family context.
> In the light of the *Frame* decision, what is required is for the provinces to amend the relevant statutes to recognize the validity of a cause of action for breach of fiduciary obligations between custodial and non-

custodial spouses. Most of the work has been done. The reasons of Wilson J. spell out, almost in code form, what should be included in the legislation. All that is necessary now is for the legislatures to rise to the task."

Littner, Ner, "The Effects on a Child of Family Disruption and Separation from One or Both Parents" (1973), 11 R.F.L. 1.

Written by a psychiatrist, this article is quite old and manifests somewhat dated attitudes. He does adopt the current view that it is very important to the child's psychological well-being to maintain contact with both parents, and goes so far as to say that "even with the parent who is overtly psychotic or overtly brutal, it is often possible to organize the visits so that they maintain the positives of the relationship for the child while minimizing the negatives of this relationship." (at 16). While there is nothing in this article on access enforcement per se, his brief comments on the child who is reluctant to visit are of interest.

Maidment, Susan, Child Custody and Divorce (Great Britain: Biddles Ltd., Guildford and King's Lynn, 1984).

With respect to access, this Australian book stresses the benefits (by and large) of continued access to both parents and also acknowledges the law's general inability to cope with this area. The author makes an interesting comment, at p. 235 - "The most striking aspect of the legal regulation of access is the significant lack of interest in the problem...Among the legal profession generally access is not considered a serious problem; indeed few cases come to the higher courts for rulings on whether access is in the interests of the child's welfare. The lack of interest is matched by much academic legal writing in which thought and effort is given to custody issues, but access is often ignored or merely mentioned in passing."

McDonald, M.D. and R.N. Komar, "Access Rights to Children and Maintenance Obligations: A Quid Pro Quo?" (1979), 2 Can. J. Fam. L. 299.

This older Canadian article is extremely well-researched and carefully documented. The main focus of the article is Canadian and American jurisprudence respecting the relationship between access and support. The authors argue that the two issues should be totally separate, the main rationale

being that the separate interests and rights of children are otherwise prejudiced. The authors touch brioefly on other means of access enforcement, including contempt and modification of custody.

MacKinnon, V.J. and J.R. Groves, "Some Proposals to Reform Custody Litigation" (1988), 3 C.F.L.Q. 287.

The authors are a family law lawyer and a clinical psychologist practicing in Ontario. The article reviews the law of custody generally and Ontario legislation in particular and presents proposals for reform. The authors believe that "custody litigation is neither normal nor commendable and can be attributed to the deficiencies of at least one parent." (at 312 - 313). The authors recommend inter alia, a presumption of joint legal custody. Respecting access enforcement, the authors subscribe to the generally accepted view of the importance of regular contact with both parents after separation. They state that "some of the most intransigent problems in the family law field arise from ongoing access disputes to which the judicial system is ill-equipped to respond. Consider that the tools available range from basically doing nothing beyond reiterating or redefining existing rights up to the very drastic measures of changing custody, denying access, or committing a contemptuous parent to jail. There is virtually no middle ground." The authors speak favourably of the tort remedy which "regrettably" the Supreme Court of Canada rejected in **Frame v. Smith** and Ontario's access enforcement legislation (then before the legislature), but suggest that rather than look to new remedies, greater emphasis should be placed in custody decisions on the parents' ability to facilitate access with the other parent.

McLeod, Barbara, "Summary of the 1982 Friend of the Court Reform Package" (1983), 62 Mich. B.J. 430.

The author very briefly describes the Michigan **Friend of the Court Act** and **Support and Visitation Enforcement Act** which became effective in 1983. Her cursory description of the access enforcement provisions of the latter act indicates that the remedies it provides includes modification of the visitation terms, make-up visitation, or commitment to jail with or without work privileges.

McLeod, James G., Annotation, **O'Byrne v. Koresec** (1986), 2 R.F.L. (3d) 104.

This annotation is the first of several articles on access enforcement written by James McLeod, Professor of family law at the University of Western Ontario and editor of **Reports on Family Law** and the **Canadian Family Law Quarterly**. McLeod's theme is that access denial is a serious problem and the usual remedies are largely ineffective. In this annotation the author applauds the B.C. Supreme Court's decision in 1986 to give a custodial mother a fine, or seven days in jail, in default for repeatedly refusing access. He asserts that much of the litigation in the past "involved little more than posturing." While he says that, in many cases, the traditional remedies of fining, jailing, or change of custody are inappropriate because of adverse impact upon the child, in cases of continued or major access violations, he advocates jailing the offending parent and enjoining them "from using the incident to (further) poison the child's mind". With minor violations, he says "it may be that there is no way to enforce access without some potential disruption to the children. If so, public education and judicial admonition may be the only appropriate means of dealing with minor violations."

McLeod, James G., Annotation, **Rutherford v. Rutherford** (1986), 4 R.F.L. (3d) 457.

In **Rutherford**, the court was unable to determine which parent was causing the child's difficulties with access, gave the non-custodial parent supervised access, and said that if the access did affect the child's emotional health, then custody could be changed or access could be terminated regardless of which parent was responsible for the problem. In McLeod's view "such threats (to change custody) by the courts ring hollow. The more likely scenario is that access will be terminated...even where the problem may be laid squarely at the feet of the custodial parent." McLeod is pessimistic that the courts have the ability to deal with access problems: "In reality, there is little the court can do to assist the access parent in the face of interference with access by the custodial parent. The judicial process, overall, is too slow and its tools too blunt." He suggests compulsory conciliation may be the answer.

McLeod, James G., Annotation, **Russo v. Russo** (1988) 12 R.F.L. (3d) 243.

The annotation mainly deals with other issues raised by this case, but the author does comment briefly on the access aspect. He notes that the court rightly concluded that the

father's failure to exercise access resulted in increased costs to the mother. "These increased costs included the extra money required to care for the child while he was in the home for the additional period, as well as the extra physical and emotional effort required of the mother to care for the child during this time." The judge ordered increased child support, partly to compensate the mother for these costs, but McLeod notes that, whatever the judge's intentions, the actual increase in support ordered was really no more than an inflationary adjustment.

McLeod, James G., "Enforcement of Access and Ontario Bill 124" (1989) 4 C.F.L.Q. 335.

McLeod repeats his criticisms of existing remedies for access denial calling the courts "almost powerless" in most cases and existing legislation "grossly inadequate." Again, he states that the "(r)eality may be that there is no way to adequately monitor and enforce access rights given their temporal nature." However, he feels that if state enforcement of support orders in contrast to the lack of enforcement of access orders is an apparent injustice which needs to be remedied by legislation. "At the very least... legislators and courts should be seen to be trying to ensure compliance." He reviews the Bill 124 amendments to the Ontario Children's Law Reform Act which received royal assent in 1989 and which were intended to strengthen access rights. In McLeod's opinion, the provisions are "unremarkable" but reasonable. There is surprisingly little analysis as to how the provisions would have improved upon the remedies otherwise available to access parents.

McLeod, James G., Annotation, **Gillies v. Gillies** (1990), 27 R.F.L. (3d) 53.

In this case the custodial mother moved to England with the child without notice to the father despite an agreement prohibiting removal from the jurisdiction. The court reduced child support, partly because of the access problem, and remitted arrears proportionately. McLeod refers to the general rule of separation of access and support and suggests that a compromise would be appropriate, balancing concern for the child's welfare with a need for fairness between the parties. The parties clearly link access and support. There is no reason, within bounds, why the court cannot recognize the inter-relationship between access and support."

McLeod, James G., Annotation, G.L.P. v. J.M.P. (1990), 27 R.F.L. (3d) 64.

The court in this case threatened to changed custody if the custodial mother persisted in her denial of access, the court having concluded that her allegations of against the father of child abuse were unfounded. McLeod takes the opportunity to repeat his views that existing remedies to access denial are inadequate. "The current ad hoc responses of the courts, including the constant restatement of rules and threats, satisfies no one." The author adverts to the fact that the dispute over this issue has polarized along gender lines and that there "is no question that dissatisfaction is growing. Many access or father's rights support groups now exist. It is no longer satisfactory to simply state that access and support are not linked."

McLeod, James G. Annotation, Lee v. Lee (1990), 29 R.F.L. (3d) 417.

In this case, the B.C. Court of Appeal had refused to link access and support and McLeod criticizes this in principle. McLeod makes the bold statement that "access orders are not enforceable" but nevertheless argues that in appropriate cases child support should take into account denial of access in order obviously to enforce access. He argues that the principle of non-linkage should be relaxed where the child will not suffer and there has been a consistent and wilful refusal to facilitate access. At 418, he states:

> "As long as the children's needs will not suffer, a court should consider removing the child support burden in whole or part and shifting it to the custodial parent in the face of a consistent and wilful refusal to facilitate access. If there is a reason to deny access, the custodial parent should be encouraged to let a court deal with the matter. Self-help should be discouraged and parties should be encouraged to respect court orders. Forcing one parent to comply with a court order but allowing the other to ignore the order does neither. If, as in Lee v. Lee, there is a real child-related access problem, a court should vary access. If one spouse is poisoning the children's views or interfering with access solely for personal reasons, some thought should be given to a realistic means of enforcing access or altering support so long as the children will not suffer. While the range of cases within which this may be possible might be narrow, the principle may make the conclusion more palatable in cases where support reduction is refused."

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McLeod, James G., Annotation, R. v. Petropoulous (1990), 29 R.F.L. (3d) 289.

In this case the British Columbia Court of Appeal upheld the conviction under s. 282 of the Criminal Code of a custodial parent who had removed his child from the jurisdiction in contravention of specified access and non-removal orders. The author predicts "a flurry of cases relying on R. v. Petropoulous to protect access rights."

Niman, Howard, "Custody, Access and Parental Mobility Rights" (1989), 4 C.F.L.Q. 95.

The author reviews the Canadian jurisprudence respecting the custodial parent's right to remove his or her children from the jurisdiction. This article is a good overview of parental mobility rights cases and how the custodial parent's right to freedom of movement may conflict with the access parent's rights (and the child's) to access. It touches upon several of the issues that remain to be resolved in this area, e.g. what is a sufficient reason to effectively remove the access parent from his or her parental role; is there ever a good enough reason to do this? While the article does not discuss access enforcement per se, the analysis is important in terms of the overlap between parental mobility issues and relocation as a denial of access.

Novison, Steven L., "Post-divorce Visitation: Untying the Triangular Knot", [1983] U. Ill. L. Rev. 121.

This lengthy essay by an American law professor explores a number of access issues in the American context. Much of the discussion is very theoretical and academic but it is very thorough and well researched. First he looks at the constitutional basis for access and concludes that non-custodial parents and child's rights to access are constitutionally protected and access cannot be terminated without due process and a finding of parental unfitness. Secondly he examines in great depth the Goldstein, Freud and Solnit thesis and analysis from several points of view and rejects it as incorrect and undesirable. He compares it with the Wallerstein and Kelly study and conclusions. He adopts the Wallerstein/Kelly approach that a child's relationship with the non-custodial parent is critical and says the empirical data in their study decisively refutes the Goldstein, Freud and Solnit conclusion that enforced access is detrimental to the child. Third, the author discusses the question of the

child's opposition to access. Basically the author thinks the child's wishes should be determinative, certainly with the older child, but he sees reasons deference to the child's wishes should be limited, for example, where the child's expressed wishes do not reflect his real feelings and where the child's hostility is a result of improper influence by the custodial parent. In this connection, he concisely reviews existing methods of access enforcement (contempt, modification of custody, conditional support) and the use of torts, and discusses their limitations. He concludes that "prevention", through custody decisions that have taken into account the parents' respective willingness to facilitate access is the best solution. At 192 and 193, he comments:

> "But after discussions, pleas, and threats of possible sanctions have failed to alter either the child's view or the custodial parent's conduct, the court will be confronted with deciding whether visitation should be ordered to proceed, consigning an anxiety-ridden child to a tension-filled arrangement for an indefinite period in the process. With the welfare of the child riding on the outcome, the judicial game of 'chicken' with the custodial parent may well have to stop at this point. Consistent with the state's parens patriae obligation, the child simply cannot be made a martyr to the court's legitimate outrage over the custodial parent's conduct. Therefore, the most enduring solution to this problem of improper parental influence lies in its prevention, largely achievable by awarding custody, where otherwise appropriate, to the candidate who is more willing to foster the child's good relationship with the other parent." (References omitted).

Finally, he discusses the unwilling access parent. The author feels that forcing a non-custodial parent to visit is "absurd and counter-productive" (at 196). However, where the non-custodial parent has failed to exercise scheduled access, measures should be taken. He comments favourably in Carol Bruch's proposal (supra) that the access parent be required to reimburse the custodial parent for additional expenditures caused by the missed visits, and he also suggests another possible basis for damage recovery would be compensation for the emotional injury to the custodial parent and child.

Payne, J.D. and K.L. Kallish, "A Behavioural Science and Legal Analysis of Access to the Child in the Post-Separation/Divorce Family" (1981), 13 Ottawa L. R. 215.

Written by Julien Payne of the University of Ottawa Faculty of Law and a law student, K. Kallish, this lengthy article offers a comprehensive, if not analytical, review of the literature and Canadian case law on access generally. The authors briefly discuss the contempt and change of custody remedies for access denial (at 250 - 252) but questions their efficacy. They also cursorily and uncritically review the case law on the relationship between maintenance and access (at 257 to 260). The authors devote considerable attention to discussing the benefits of conciliation and mediation in resolving custody and access disputes. Unfortunately they do not focus any of this discussion on their effectiveness respecting access denial in particular.

Pearson, Jessica and Nancy Thoennes, "The Denial of Visitation Rights; a Preliminary Look at its Incidence, Correlates, Antecedents and Consequences" (1988) 10 Law and Policy, 363.

The authors analyzed data from three different longitunal studies carried out in Colorado, California and Minnesota between 1979 and 1985 in order to assess the nature and extent of access problems and the relationship between access and support. Their analysis showed that 22% of mothers repeatedly failed to comply with access terms; that couples experiencing access problems are decidedly more embittered from the outset and that access problems and non-payment of support are related. The authors acknowledge their results can only be treated as "exploratory" for a number of reasons, including the unrepresentative nature of their sample populations. The authors note the paucity of empirical research in this area and they recommend, inter alia, research to evaluate the effectiveness of current remedies for the enforcement of both support and access orders. At 379, they comment: "improved visitation enforcement is warranted by the observed incidence of interference, the co-occurrence of visitation and child support problems and equity considerations."

Platt, M.A., "Breach of Access Orders: The Futility of the Law" (1984), 134 The New L.J. 392.

This English article notes that some non-custodial parents are passive in the face of breaches of access orders while others attempt to obtain compliance. The first step for the latter group is conciliation. When this fails, the non-custodial parent may turn to the courts. The author looks at the available remedies (order to enforce access, commit-

tal for contempt, change of custody) and concludes that "It does seem that there is very little the law, as it stands, and the legal system as presently constituted can do to assist the non-custodial parent where there is breach of an access order by a determined custodial parent...There are parents who persist with their case in the courts, often against the advice of lawyers, but it does seem that ultimately they will have to accept the impotence of the law." (at 394). This author thinks that a complete re-formulation of the legal approach to custody and access is necessary in view of the current futile state. Her only suggestion for improvement is joint custody orders but she doesn't explore the intricacies of that solution.

Poulter, S., "Access to Children" (1982), 126 Solicitor's J. 283.

There is nothing new in this English article. It takes a brief look at: grounds for denying access; sanctions for breach (imprisonment, change of custody); and encouraging satisfactory access.

Richardson, C. James, **Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results** (Canada: Department of Justice, February, 1988.)

This report on divorce mediation is based on two separate but related studies carried out in Winnipeg, Saskatoon, Montreal and St. John's. The report discusses mediation, custody and access at pp.34-40.

Ritsema, Gerhard F., "Visitation Enforcement by the Office of the Friend of the Court (Michigan)" in Diane Dodson and Sherry Green de la Garza, eds., **Improving Child Support Practice** (Washington: American Bar Association, 1986), Vol. 2, III-142.

This is a summary of visitation enforcement by the Michigan Friend of the Court program written by one of the 65 "Friends of the Court." It is very brief and does not provide much detail.

Samuels, Alec, "Refusal or Failure to Observe Access Order - the Remedy for the Aggrieved Party" (1981), 11 Fam. L., 156.

This brief article outlines sanctions in England for breaches of access orders: warnings, specified access, supervised access, change of custody, temporary termination of access, and civil contempt. The author believes the problem is "comparatively rare, but of considerable concern

when it does arise." He sees no easy answer to the problem, but suggests more counselling might help.

Slaughter, M.G., "Refusal to Pay Child Support in Response to Visitation Interference" (1984), 63 Mich. B. J. 1147.

This American article reviews Michigan case law related to when a non-custodial parent will be excused from support payments for visitation interference.

Slaughter, M.G., "Suspension of Child Support for Visitation Interference and the New Friend of the Court Acts" (1985), 3 Cooley Law Rev. 119.

This American article reviews Michigan cases involving the effect of access interference on child support and the Michigan Friend of the Court legislation. The author argues that "only where the custodial parent lives out-of-state, has destroyed the visiting parent-child relationship, or cannot be coerced by a refusal to enforce rights which do not impinge on the well-being of the child, should any consideration of visitation interference be given in matters of child support enforcement." He recommends a "better remedy for visitation interference" would include: "(1) mediation and counseling with respect to the particular conduct or situation that led to the visitation dispute; (2) rehabilitation of the parent-child relationship which may have been harmed by unjustified visitation interference; (3) non-enforcement of rights of the custodial parent, which do not harm the child, when that parent unjustifiably interferes with visitation; and (4) exercise of the civil contempt power of the court to coerce the custodial parent's cooperation with visitation privileges. Such a remedy package would focus punishment on the wrongdoer as opposed to the child. The ultimate sanction, contempt, would be equivalent in coercive effect to the main remedy for child support non-payment."

Spector, Robert G., "Marital Torts" (1989), 15 F.L.R. 3023.

The author reviews developments on the application of tort law in family litigation in the United States, including a short summary of the law respecting tortious interference with access.

Stone, Nigel, "Out of Sight, But Not Out of Mind: Increasing Options for Access" (1988), 18 Fam. L. 216.

This short English article criticizes the practice of the English courts in terminating access in intransigent situations and suggests the court and workers should look for better alternatives directed towards maintaining the ties between the non-custodial parent and the child. Indirect contact through grandparents is one option offered.

Wallerstein, Judith S. and Joan B. Kelly, **Surviving the Breakup: How Children and Parents Cope with Divorce** (New York: Basic Books, 1980).

The authors, child psychologists, studied sixty separated families at intervals over a period of 5 years in between 1971 to 1977 in the California Children of Divorce Project. They concluded, inter alia, that a continued relationship with parents after separation is critical to a child's healthy development.

Wallerstein, Judith S. and Sandra Blakeslee, **Second Chances: Men, Women and Children a Decade after Divorce** (New York: Teckner and Fields, 1989).

As a result of further research, Dr. Wallerstein revises her conclusions on joint custody, but not on the importance of continuing contact between non-custodial parents.

Webb, P.R.H., "Parents, Maintenance and Access", [1987] N.Z.L.J. 84.

This article reviews New Zealand case law and examines the relationship between access and maintenance orders. The author concludes that they are independent and, absent special circumstances, maintenance should not be discontinued for denial of access.

"Family Law. Review of Child Law: Custody", The Law Commission Working Papers No. 96 (Great Britain: Professional Books Limited, 1986) 1.

This English report takes the view that unless the parents have the proper attitude to access, the law is powerless to enforce access. It also says that there is nothing the court can do to force the non-custodial parent to keep in touch. It suggest two ways in which the law might encourage access: (1) set guidelines on what is "reasonable access". If difficulties between parent and child develop, these may be solved more effectively by increasing access rather then

decreasing, which is currently the norm; and (2) recognize the continued parental status of the non-custodial parent during access. One method is through the use of joint custody orders.

Violating Visitation Orders Ruled Actionable Tort" (Jan. 1984), 70 A.B.A.J. 135.

A Cook County, Illinois circuit court judge recognized intentional infliction of emotional distress as a cause of action when a non-custodial parent is denied visitation because the custodial parent takes the child or children out of the jurisdiction. New York, North Carolina and Vermont had already allowed this tort. "The defendant's conduct must be more than mere insults or annoyances, but must be proven to go beyond all possible bounds of decency."

Wilson, Jeffrey and Mary Tomlinson, **Children and the Law Second Edition** (Toronto: Butterworths, 1986).

Chapter 2 of this text, "The Family in Contact: Custody and Access" canvasses the law in Canada respecting access, including access enforcement.

_____, (1989) 102 Harvard Law Review 920.

This note comments on a recent California Appellate court decision **In re Marriage of Boudreaux**, 201 Cal. App. 3d 447, 247 Cal. Rptr. 234 (6th Dist. 1988) where the court terminated child support on the father's application because of the custodial mother's "outrageous conduct" in denying access and sabotaging the relationship between the father and his son. Despite the fact the mother and her new husband were well able to support the child this article takes the view that any exceptions to the rule of non-linkage of custody and support established in California are not just justified. "...the practice of linking visitation and support rights is ultimately an ineffective and potentially dangerous way to regulate custody." (at 920). The article basically sees any exception as the thin edge of the wedge opening the way to imposition of the remedy in those cases where it would be most effective and most destructive - i.e. where the custodial parent and child need the money. Instead the article recommends use of "other superior methods" of deterrence such as contempt proceedings. Unfortunately the article does not elaborate upon these other methods or their alleged superiority.